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Supreme Court, U.S.
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No. 00-6933

IN THE

Supreme Court of the United States

REMON LEE,

Petitioner,

v.

MICHAEL KEMNA, Superintendent,
Crossroads Correctional Center,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONER

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May 2001

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QUESTIONS PRESENTED

The petition for certiorari was prepared without the benefit of counsel. Court-appointed counsel has slightly reworded the questions presented in the case, which are as follows:

1. Whether petitioner was denied his rights to a fair trial and due process of law under the Fourteenth Amendment to the United States Constitution when the state trial court refused to grant him an overnight continuance to locate his three subpoenaed alibi witnesses who unexpectedly, and for reasons not attributable to the defendant, did not return after a lunch break on the last day of trial.

2. Whether the district court should have conducted an evidentiary hearing to consider whether petitioner's alibi witnesses were told by a state officer that they could leave the courthouse because their testimony would not be needed until the following day.

3. Whether, under the circumstances presented here, petitioner's federal due process claim was procedurally defaulted for failure to comply with state procedural rules governing motions for continuances that were adequate to support the denial of relief, and, if so, whether he has shown "cause" and "prejudice" to excuse the default.

4. Whether, assuming his federal due process claim is procedurally defaulted and that he has failed to show "cause" and "prejudice," petitioner has made a sufficient showing of "actual innocence" under *Schlup v. Delo,* 513 U.S. 298 (1995), to require the district court to conduct a hearing to evaluate his evidence so as to prevent the fundamental miscarriage of justice that would arise from the conviction and incarceration of an innocent man.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

1. The State Court Trial 2

2. State Postconviction Proceedings 8

3. Consolidated Appeal to the Missouri Court of Appeals 10

4. Federal Habeas Corpus Proceedings 12

   a. The District Court 12

   b. The Court of Appeals 15

SUMMARY OF ARGUMENT 17

ARGUMENT 21

I. THE TRIAL COURT'S DENIAL OF A BRIEF CONTINUANCE TO ALLOW LEE TO PRESENT HIS ALIBI WITNESSES VIOLATED LEE'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW, AND HE IS ENTITLED TO AN EVIDENTIARY HEARING TO ESTABLISH WHY THE WITNESSES LEFT 21

A. The Trial Court's Denial of the Requested Overnight Continuance Violated Lee's Right to Present a Defense 21

B. This Court Should Remand for an Evidentiary Hearing to Determine Whether a State Official Told His Alibi Witnesses That They Could Leave 26

II. LEE'S DUE PROCESS CLAIM IS NOT PROCEDURALLY DEFAULTED BECAUSE THE DECISION OF THE MISSOURI COURT OF APPEALS DID NOT REST ON "ADEQUATE" STATE LAW GROUNDS 29

A. Missouri Supreme Court Rules 24.09 and 24.10 Are Not Consistently Followed 30

B. Rules 24.09 and 24.10 Are Not Adequate to Defeat Review of Lee's Due Process Claim in These Particular Circumstances 34

III. LEE HAS SHOWN "CAUSE" AND "PREJUDICE" TO EXCUSE ANY PROCEDURAL DEFAULT ... 41

A. Cause 41

B. Prejudice 43

IV. LEE IS ENTITLED TO A HEARING TO EVALUATE WHETHER HE IS ACTUALLY INNOCENT OF THE CRIME. 45

CONCLUSION 50

APPENDIX A 1a

APPENDIX B 2a

APPENDIX C 9a

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Amadeo v. Zant, 486 U.S. 214 (1988) 42, 43

Amrine v. Bowersox, 128 F.3d 1222 (8th Cir. 1997), *cert. denied*, 523 U.S. 1123 (1998) 47

Bennett v. Scroggy, 793 F.2d 772 (6th Cir. 1986) 26

Blackledge v. Allison, 431 U.S. 63 (1977) 29

Bousley v. United States, 523 U.S. 614 (1998) 48

Brady v. Maryland, 373 U.S. 83 (1963) 18, 26

Brown v. Western Railway, 338 U.S. 294 (1949) 40

Calderon v. Thompson, 523 U.S. 538 (1998) 49

Chambers v. Mississippi, 410 U.S. 284 (1973) 22

Chandler v. Fretag, 348 U.S. 3 (1954) 25

Coleman v. Thompson, 501 U.S. 722 (1991) 29, 31, 42, 43

Crane v. Kentucky, 476 U.S. 683 (1986) 18, 22, 23

Davis v. Wechsler, 263 U.S. 22 (1923) 40

Dickerson v. Alabama, 667 F.2d 1364 (11th Cir. 1982) .. 26

Dobbs v. Zant, 506 U.S. 357 (1993) 26

Douglas v. Alabama, 380 U.S. 415 (1965) 40

Engle v. Isaac, 456 U.S. 107 (1982) 30, 45

Ford v. Georgia, 498 U.S. 411 (1991) 19, 31, 36

Harris v. Nelson, 394 U.S. 286 (1969) 45

Harris v. Reed, 489 U.S. 255 (1989) 30, 48

Hathorn v. Lovorn, 457 U.S. 255 (1982) 31, 34

Henry v. Mississippi, 379 U.S. 443 (1965) 40

Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. (1981) 26

James v. Kentucky, 466 U.S. 341 (1984) 31, 38, 39

Johnson v. Johnson, 375 F. Supp. 872 (W.D. Mich. 1974) 26

Johnson v. Mississippi, 486 U.S. 578 (1988) 30

Kuhlmann v. Wilson, 477 U.S. 436 (1986) 43, 48

Kyles v. Whitley, 514 U.S. 419 (1995) 20, 44, 45

Lambrix v. Singletary, 520 U.S. 518 (1997) 29

Manlove v. Tansy, 981 F.2d 473 (10th Cir. (1992) 26

McCleskey v. Zant, 499 U.S. 467 (1991) 41, 43, 46

Meadows v. Delo, 99 F.3d 280 (8th Cir. 1996) 47

Michel v. Louisiana, 350 U.S. 91 (1955) 34

Michigan v. Tyler, 436 U.S. 499 (1978) 39

Morris v. Slappy, 461 U.S. 1 (1983) 24

Murray v. Carrier, 477 U.S. 478 (1986) ..... *passim*

NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964) 40

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 36

In re Oliver, 333 U.S. 257 (1948) 18, 21

Osborne v. Ohio, 495 U.S. 103 (1990) 40

Papasan v. Allain, 478 U.S. 265 (1986) 9

Pate v. Robinson, 383 U.S. 375 (1966) 25

Reasonover v. Washington, 60 F. Supp. 2d 937 (E.D. Mo. 1999) 47, 48

Reed v. Ross, 468 U.S. 1 (1984) 42

Reynolds v. Cochran, 365 U.S. 525 (1961) 25

Rogers v. Alabama, 192 U.S. 226 (1904) 40

Sawyer v. Whitley, 505 U.S. 333 (1992) 49

Schlup v. Delo, 513 U.S. 298 (1995) ..... *passim*

Shuttlesworth v. City of Birmingham, 376 U.S. 339 (1964) 39

Singleton v. Lefkowitz, 583 F.2d 618 (2d Cir 1978) 26

Smith v. Armontrout, 888 F.2d 530 (8th Cir. 1989) 47

Smith v. Murray, 477 U.S. 527 (1986) 42, 45

Staub v. Baxley, 355 U.S. 313 (1958) 19, 39

Stone v. Powell, 428 U.S. 465 (1976) 25, 46

Strickler v. Greene, 527 U.S. 263 (1999) 42, 45

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 34

Townsend v. Sain, 372 U.S. 293 (1963) 29

Trevino v. Texas, 503 U.S. 562 (1992) 39

Ungar v. Sarafite, 376 U.S. 575 (1964) 24, 33

United States v. Frady, 456 U.S. 152 (1982) 43

United States v. Mejia, 69 F.3d 309 (9th Cir. 1995) 26

United States v. Wade, 388 U.S. 218 (1967) 44

Wainwright v. Sykes, 433 U.S. 72 (1977) 30, 39, 41

Ward v. Board of County Commissioners, 253 U.S. 17 (1920) 37

Washington v. Texas, 388 U.S. 14 (1967) 18, 22

Webb v. Texas, 409 U.S. 95 (1972) 18, 26

Williams v. Taylor, 529 U.S. 420 (2000) 18, 27, 29

STATE CASES

Fuller v. Missouri, 837 S.W.2d 304 (Mo. Ct. App. 1992) 33, 34

Jones v. Missouri, 771 S.W.2d 349 (Mo. Ct. App. 1989) 28

Missouri v. Adams, 808 S.W.2d 925 (Mo. Ct. App. 1991) 35, 36

Missouri v. Adkins, 678 S.W.2d 855 (Mo. Ct. App. 1984) 32

Missouri v. Anderson, 785 S.W.2d 299 (Mo. Ct. App. 1990) 35

Missouri v. Ashley, 616 S.W.2d 556 (Mo. Ct. App. 1981) 33

Missouri v. Bell, 719 S.W.2d 763 (Mo. 1986) 32

Missouri v. Coats, 835 S.W.2d 430 (Mo. Ct. App. 1992) 35

Missouri v. Davis, 625 S.W.2d 903 (Mo. Ct. App. 1981) 33

Missouri v. Dodd, 10 S.W.3d 546, 555 (Mo. Ct. App. 1999) 34

Missouri v. Downen, 3 S.W.3d 434, 438 (Mo.Ct. App. 1999) 32

Missouri v. Driver, 912 S.W.2d 52 (Mo. 1995) 28

Missouri v. Fletcher, 758 S.W.2d 476 (Mo. Ct. App. 1988) 39

Missouri v. Gasaway, 720 S.W.2d 3 (Mo. Ct. App. 1986) 36

Missouri v. Greathouse, 694 S.W.2d 903 (Mo. Ct. App. 1985) 32

Missouri v. Green, 647 S.W.2d 902 (Mo. Ct. App. 1983) 33

Missouri v. Haggard, 619 S.W.2d 44 (Mo. 1981), *vacated on other grounds*, 459 U.S. 1192 (1983) ... 32

Missouri v. Johnson, 618 S.W.2d 191 (Mo. 1981) 37

Missouri v. Johnson, 812 S.W.2d 940 (Mo. Ct. App. 1991) 31

Missouri v. Jordan, 639 S.W.2d 400 (Mo. Ct. App. 1982) 31

Missouri v. Kechrid, 822 S.W.2d 552 (Mo. Ct. App. 1992) 32

Missouri v. Lachterman, 812 S.W.2d 759 (Mo. Ct. App. 1991) 33, 35

Missouri v. McCarter, 820 S.W.2d 587 (Mo. Ct. App. 1991) 34, 35

Missouri v. McLaurin, 684 S.W.2d 570 (Mo. Ct. App. 1984) 33

Missouri v. Merrick, 677 S.W.2d 339 (Mo.Ct. App. 1984) 32

Missouri v. Peters, 731 S.W.2d 480 (Mo.Ct. App. 1987) 31

Missouri v. Petterson, 780 S.W.2d 675 (Mo.Ct. App. 1989) 32

Missouri v. Richardson, 718 S.W.2d 170 (Mo. Ct. App. 1986) 32

Missouri v. Ruth, 830 S.W.2d 24 (Mo. Ct. App. 1992) 31

Missouri v. Schaal, 806 S.W.2d 659 (Mo. 1991) 32

Missouri v. Smith, 633 S.W.2d 412 (Mo. Ct. App. 1982) 31

Missouri v. Sneed, 874 S.W.2d 489 (Mo. Ct. App. 1994) 35

Missouri v. Stout, 604 S.W.2d 710 (Mo. Ct. App. 1980) 32

Missouri v. Stout, 675 S.W.2d 931 (Mo. Ct. App. 1984) 31

Missouri v. Tettamble, 746 S.W.2d 433 (Mo.Ct. App. 1988) 35

Missouri v. Wade, 666 S.W.2d 869 (Mo. Ct. App. 1984) 31

Missouri v. Watson, 806 S.W.2d 677 (Mo. Ct. App. 1991) 28

Missouri v. Winston, 627 S.W.2d 915 (Mo. Ct. App. 1982) 31

Missouri v. Wolfe, 13 S.W.3d 248, 261 (Mo. 2000) .. 34, 35

Missouri v. Yates, 869 S.W.2d 270 (Mo. Ct. App. 1994) 28

CONSTITUTION AND FEDERAL STATUTES

U.S. Const. Amend. XIV, Due Process Clause ..... *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 12

28 U.S.C. § 2254(e)(2) 1, 15, 19, 27, 29

MISSOURI SUPREME COURT RULES

Missouri Supreme Court Rule 24.09 (1994) ..... *passim*

Missouri Supreme Court Rule 24.10 (1994) ..... *passim*

Missouri Supreme Court Rule 26.03 (1994) 22

Missouri Supreme Court Rule 29.15 (1994) ..... *passim*

MISCELLANEOUS

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970) 48

Daniel J. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128 (1986) 40

United States Department of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996) 44, 45

OPINIONS BELOW

The opinion of the court of appeals affirming the dismissal of Lee's petition for a writ of habeas corpus is reported at 213 F.3d 1037 (8th Cir. 2000), and is reproduced in the Joint Appendix ("J.A.") at 233. The district court's opinion dismissing the petition is not reported and is reproduced at J.A. 212. The district court's unreported order denying petitioner's motion for reconsideration and denying him a certificate of appealability is reproduced at J.A. 229.

The unreported order of the state trial court denying Lee's motion for state postconviction relief is reproduced at J.A. 67. The order of the Missouri Court of Appeals affirming, in a consolidated appeal, Lee's convictions and the denial of state postconviction relief, is reported at 935 S.W.2d 689 (Mo. Ct. App. 1996), and reproduced at J.A. 122. The memorandum opinion accompanying that order is unreported and reproduced at J.A. 123.

JURISDICTION

The court of appeals entered judgment in this case on May 25, 2000. Petitioner filed a petition for rehearing and petition for rehearing en banc, which was denied on August 8, 2000. The petition for a writ of certiorari was filed on November 3, 2000, and granted on February 26, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The case also involves 28 U.S.C. § 2254(e)(2) and Missouri Supreme Court Rules 24.09, 24.10, and 29.15 (1994), which are set out in the Appendix ("App."), 1a-8a, to this brief.

STATEMENT OF THE CASE

Petitioner Remon Lee was convicted of first-degree murder and armed criminal action after a three-day jury trial held on February 22-24, 1994, in the Circuit Court of Jackson County, Missouri. He was sentenced to concurrent terms of life imprisonment without parole on the murder charge and ten years of imprisonment on the armed criminal action. R. 8 (Legal File, at 34, 36, 41); J.A. 34, 42-43.[1]

The issue at trial was whether the two eyewitnesses correctly identified Lee as the driver of the get-away truck after the shooting that killed Steven Shelby. Lee's intended defense was that he was in California, staying with family, at the time of the shooting and thus, that he could not have committed the crime. He never had a chance to present that defense.

1. The State Court Trial

a. The key evidence put on by the state at trial was as follows: Two eyewitnesses, Reginald Williams and William Sanders, testified that in the afternoon of August 27, 1992, the two of them were trying to start a moped in a yard in Kansas City. Tr. 205-06, 384-85, 397. While they were occupied with the moped, an older model rusty red and white truck drove up the street, with the driver its only occupant. Tr. 207-09, 211-12, 386, 401. The truck pulled into a driveway, turned around, and then drove back down the street, passing Williams and Sanders again. Tr. 208-10, 212, 268-69, 386-88. Although the driver was not paying attention to them at first, he stared at Williams and Sanders for two to ten seconds the second time he drove by. Tr. 208, 212-13, 325-29, 386, 398-400.

The truck parked nearby and remained there, with the driver inside, for thirty minutes to an hour. Tr. 388, 400.

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[1] Documents included in the district court record will be cited by Record ("R.") number. All documents from the state court proceedings included in the federal record were filed by the state in R. 8. The trial transcript will be cited as "Tr." and the sentencing transcript as "S. Tr."

Eventually, a blue 1965 Chevy Nova, carrying a driver and one passenger, came around the corner. Tr. 215, 378, 389, 401. The Nova pulled up across from the truck, and the car's passenger, later determined to be Reginald Rhodes, jumped out, ran around the front of the Nova, fired six or seven shots into the driver's side of the Nova, and then jumped into the passenger side of the truck. Tr. 213-18, 390, 400-01. The truck then sped off. Tr. 220, 390. Steven Shelby, the driver of the Nova, died from gunshot wounds. Tr. 436-37. No gun was ever recovered. Tr. 380, 383.

According to Williams and law enforcement witnesses, Williams was shown a photospread later that day of the shooting and tentatively identified Remon Lee, whom he had never seen before, Tr. 232, 279, as resembling the driver of the truck, although he wanted to see a better photograph or the individual in person before he could be certain. Tr. 226-27; 355-56, 359-60, 362. Williams later identified Lee as the driver after viewing two videotaped lineups, Tr. 228-32, 365-66, 369-72, and identified Lee at trial. Tr. 208-09. Williams could not identify the shooter. Tr. 264, 356, 372-74.

On cross-examination, Williams stated that he could see the driver of the truck only from the shoulders up. Tr. 273. He described the driver as a black man with a mustache, who was wearing a black silk shirt and a shoulder-length "curl" hairstyle. Williams testified there was nothing unusual about the driver's eyebrows or other facial features and that the driver was not wearing glasses. Tr. 274-77.

Williams admitted on cross-examination that he had lied to people investigating the case because he did not wanted to be "bothered." Tr. 234-35. He acknowledged that in a taped interview, he had told Lee's first defense counsel, Robert Calbi, and defense investigator Freddie Macon that Reginald Rhodes was the driver of the truck. Tr. 283, 285-88. Williams claimed at trial, however, that he had told Calbi that Rhodes, rather than Lee was the driver, because he had misunderstood the question, Tr. 283, and because Williams "didn't want to be bothered with him." Tr. 287. Williams admitted that he had told Calbi that he

had not picked anyone out of a lineup and that he could not identify the shooter or the driver. Tr. 290-93. He also acknowledged that he had initially testified in a deposition that Sanders, not Williams, had actually given the statement recorded in the police report, and that he later testified in the deposition that he, Williams, had given the report after all to the police, but that he had simply agreed with whatever Sanders said "to back him up." Tr. 308-11.[2]

On the day of the shooting, the police showed William Sanders the same photospread shown to Reginald Williams. Tr. 356-57, 393, 411. Sanders, too, did not know Rhodes or Lee before the shooting. Tr. 394. He identified Rhodes as the shooter, but he could not identify Lee or anyone else as the driver of the truck. Tr. 357-59, 363-64. Sanders described the driver as a black man with a collar-length "curl," "real thick" eyebrows, and a mustache. Tr. 403, 405-07, 409. Unlike Williams, Sanders testified that the driver was wearing sunglasses. Tr. 404.

Sanders admitted that he had not previously identified the driver in either a photospread or video lineup, Tr. 393, 397, 411, 421, and the prosecutor did not expect Sanders to identify Lee in court. *See* Tr. 181 (prosecutor's opening statement that only Williams had been able to identify the driver). Then, during cross-examination, Sanders claimed that now he could identify the driver. Tr. 396. Upon questioning by the trial judge, Sanders, for the first time, identified Lee as the driver of the truck—in a trial that took place a year and a half after the shooting. Tr. 414.

Rhonda Shelby, the victim's sister, testified that she saw Lee and Rhodes together near a red truck behind her duplex in Kansas City, between 8:00 and 9:00 p.m. on August 26, 1992, the night before the shooting. Tr. 443-45, 455. Rhonda Shelby

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[2] Throughout his testimony, Williams repeatedly contradicted himself as to whether he had in fact given the police a written statement, marked as State's Exhibit 15, on the day of the murder. *See, e.g.*, Tr. 220-27, 265-68, 306-08, 310-11.

knew Lee and identified him at trial. Tr. 443-44, 453. She claimed that she saw Lee and Rhodes when she was in her car, pulling in to park in her garage. Tr. 455-56, 460, 467-68. She did not speak to Lee. Tr. 455, 461-62. Later that same night, Rhodes approached her, looking for her brother. Tr. 444-46.

Lynne Bryant, a good friend of both Steve and Rhonda Shelby, Tr. 475, also testified that she saw Lee and Rhodes outside her duplex, adjacent to Rhonda Shelby's, the evening before the shooting. Tr. 471-72. Bryant knew both of them and identified Lee in the courtroom. Tr. 471-72. That night, Rhodes had asked Bryant if she had seen Steve Shelby; she did not speak to Lee. Tr. 478-79. Bryant testified that she remembered Lee driving an old orange truck, Tr. 473, though she told the police that a man named Terry Barrett was known to own and drive a red and white older model pickup truck. Tr. 486-87; *see also* note 8, *infra*.

No corroborating physical evidence put Lee at the scene of the crime or linked him to Shelby's death. Tr. 378-82. The state offered no explanation or motive for why Lee might have been involved in killing the victim. The shooter, Rhodes, who had pleaded guilty to the murder before Lee's trial, J.A. 37-38, did not testify against Lee.

b. At just before 10:00 a.m. on Thursday, February 24, the state rested its case, and Lee began his case in chief. Tr. 489, 491. Defense counsel had described Lee's defense in detail in his opening statement. After pointing out the flaws with Williams' identification of Lee, defense counsel informed the jury and the court that there would be an alibi defense and that Lee's mother, Gladys Edwards; his stepfather, James Edwards; and his sister, Laura Lee, would testify that Lee was visiting them in Ventura, California in August 1992, and thus could not have committed the crime. Counsel explained that the three alibi witnesses would testify that Lee came to visit them in California in July 1992 to celebrate his birthday and that of Laura Lee's daughter Maria, and that his mother and stepfather drove to Los Angeles, met Lee at the airport, and brought him to his sister's house, where he stayed through the rest of July,

August, September, and most of October, until around Halloween. The family remembered that Lee did not leave until late October because they begged him to stay for the Halloween party they were throwing for his sister's children. Lee's stepfather brought him back to the airport. J.A. 12-13. Counsel had also mentioned the alibi defense to prospective jurors during voir dire. J.A. 10, 11-12.

After the state rested, Lee's prior defense counsel, Robert Calbi, and investigator, Freddie Macon, testified in Lee's case in chief that they had interviewed Williams on April 23, 1993. During that interview, Calbi gave Williams a photospread with Lee's photo included, but Williams could not identify Lee or anyone else as the driver. Tr. 513-14, 556-57. Williams later gave Calbi the tape-recorded statement that was discussed during Williams' cross-examination; the tape was played for the jury. Tr. 565. Following Calbi's testimony, the court adjourned for a lunch recess, after which Lee was planning to call his alibi witnesses. Tr. 570-71.

When they returned, just after 1:00 p.m., defense counsel put Lee on the stand, outside the presence of the jury, for the limited purpose of making a record regarding the disappearance of Lee's alibi witnesses and Lee's right to testify in his own defense. J.A. 15. Counsel elicited testimony that Lee's mother, stepfather, and sister had come voluntarily from California to testify for Lee. J.A. 16-17. Defense counsel had met with these witnesses on Monday, February 21, 1994, and had served each of them with a subpoena requiring their attendance on that last day of trial, Thursday, February 24, at 9:00 a.m. J.A. 16, 18, 20-21. The Kansas City Police had talked to the witnesses after they arrived in Kansas City. J.A. 16. Lee confirmed the name of the hotel where the witnesses had stayed and that they had just relocated to Lee's uncle's house. The witnesses had previously informed counsel that there was no telephone at the uncle's house. J.A. 17.

All three witnesses were at the courthouse at 8:30 a.m. that day, February 24, sitting in the witness room, Tr. 182-83; *see also* J.A. 171, until they left later that morning. J.A. 16-17.

Based on his conversations with people at the courthouse, counsel estimated that the witnesses had left at about 11:00 a.m. *Id.* The witnesses had not returned when the proceedings resumed after the lunch break. Neither Lee nor his counsel knew where they went or why they had left, and Lee's girlfriend was attempting to locate them. J.A. 17. Lee asked his counsel to request "a couple hours' continuance" to try to locate them. J.A. 18. Lee told the court that he knew the witnesses were still in town because his stepfather, a minister, had a religious event to attend in Kansas City that night and the next. *Id.* The prosecutor did not dispute any of the representations made in this exchange. Defense counsel then requested a brief continuance until 9:30 the following morning, Friday, and suggested "capiases" (arrest warrants) for the witnesses. Counsel provided an address for where the witnesses were staying. J.A. 18, 20.

The trial court denied the motion, stating: "Friday. And my daughter is going to be in the hospital all day. . . . So I've got to stay with her." J.A. 20. After confirming that counsel had indeed issued subpoenas to the family members, the court continued:

> Well, I'm going to have to deny the motion for continuance. It looks to me as though the folks were here and then in effect abandoned the defendant. And that, of course, we can't—we can't blame that on the State. The State had absolutely nothing to do with that. That's—it's too bad. The Court will not be able to be here tomorrow to try the case.

J.A. 22. Counsel then asked whether the case could be continued until the following Monday. *Id.* The trial judge rejected that request as well because he had another case set for trial beginning Monday morning. He insisted that the trial resume. *Id.*[3] During the argument on the motion, the

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[3] Defense counsel then asked a correctional officer standing in the courtroom to confirm, for the record, that he had seen the three witnesses

prosecutor did not object to the request for a continuance, and neither the trial court nor the prosecutor voiced any objection to the manner or form in which the motion was presented or to the proffer that had been made.

Lee decided not to testify because of his prior convictions. J.A. 18-19. The defense called no further witnesses and hence presented no evidence regarding Lee's alibi. J.A. 24-25. Defense counsel announced to the jury that he had subpoenaed the three family members, that they had come and gone, and that he did not know why they had left. *Id.* During his closing argument, defense counsel again apologized for the absence of the alibi witnesses. J.A. 26. In her closing argument, the prosecutor capitalized on the witnesses' disappearance, arguing: "Where are those alibi witnesses that Mr. McMullin promised you from opening. They're not here. No doubt Remon Lee was in town here on August 26th and August 27th." J.A. 27. The jury found Lee guilty of murder in the first degree and armed criminal action. J.A. 42-43; Tr. 626-27.

Lee's counsel subsequently filed a written motion for judgment of acquittal or, in the alternative, motion for a new trial. J.A. 28. He argued that the "failure of the court to grant the defendant a reasonable continuance to attempt to find the witnesses, or the court to issue a body attachment, is prejudicial error and denied the defendant a fair trial." J.A. 32. The court denied the motion during the sentencing hearing on April 19, 1994. S. Tr. 5. Lee appealed. R. 8 (Legal File, at 54). His direct appeal was held in abeyance pending resolution of Lee's state postconviction motion.

2. <u>State Postconviction Proceedings</u>

On November 21, 1994, Lee timely filed a pro se verified motion for postconviction relief in the Circuit Court of Jackson County, pursuant to Missouri Supreme Court Rule 29.15 (1994), J.A. 45-54, which was later amended by appointed

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in the witness room that morning, and the officer agreed that he had seen counsel speaking to the witnesses he described. J.A. 23-24.

postconviction counsel and again verified by Lee. J.A. 55-66. Lee alleged, *inter alia*, that he had been denied due process of law and the effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments when: (1) his alibi witnesses were "told by an unknown person that they could leave the courthouse because they were not needed to testify," J.A. 56, a person Lee surmised may have been employed by the prosecutor's office, J.A. 58; and (2) the trial court overruled Lee's motion for a continuance because of his personal schedule, without even considering that another judge might have been available to preside or that Lee might have been able to locate his witnesses that afternoon. *See* J.A. 56-59.[4] Lee provided the names of the three alibi witnesses and described what their testimony would have been. J.A. 56-57. He explained that "[a]s a result of [his witnesses] being told they were not needed to testify, [they] left the courthouse and were not present when Movant presented his evidence in chief." J.A. 57. Lee claimed that he was denied his rights to present evidence in his defense, to due process of law, and to the effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments, J.A. 56-58, and requested an evidentiary hearing. J.A. 54, 62.

In response, the state disputed that a state officer had told the alibi witnesses they could leave and contended that Lee's allegation did not "make sense" and was a "bare conclusion and . . . not a factual allegation that can even be proven to be true; therefore, it is not a proper post conviction claim." App. C, at 12a-13a.[5]

On August 21, 1995, the state court refused to hold an

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[4] Lee's claims of ineffective assistance of counsel are not before this Court.

[5] Because the state's response to Lee's Rule 29.15 motion was not included in the federal court record below, Lee has appended it in Appendix C to this brief. It is appropriate for this Court to take judicial notice of pleadings that are part of the public record. *Papasan v. Allain*, 478 U.S. 265, 298 (1986).

evidentiary hearing and denied relief on all grounds. The court treated Lee's allegation that a state official had told his witnesses they could leave as raising only a claim of ineffective assistance of counsel and accordingly denied it because Lee failed to show that counsel was responsible for the witnesses' departure. J.A. 69-70. The court did not address Lee's claim that the alleged state interference with his witnesses denied him due process of law and the right to a fair trial. The court also did not address Lee's due process claim based on the denial of the continuance because "[t]rial error is an issue properly raised on direct appeal." J.A. 70. Lee appealed. R. 8 (Postconviction Relief Legal File, at 48).

3. Consolidated Appeal to the Missouri Court of Appeals

Pursuant to Missouri Supreme Court Rule 29.15(l) (1994), Lee's direct appeal and his appeal from the denial of state postconviction relief were consolidated before the Missouri Court of Appeals.[6] In Argument I, the direct appeal portion of his brief, Lee contended that the trial court abused its discretion and violated Lee's state and federal rights to due process of law and to present witnesses in his defense, when it denied his motion for an overnight continuance. J.A. 86-87, 90-95. In Argument II, the postconviction portion of the brief, Lee argued, among several grounds for relief, that the motion court erred in denying his Rule 29.15 motion without granting an evidentiary hearing regarding both the trial court's denial of a continuance and Lee's claim that a state employee "told Appellant's alibi witnesses that they could leave the courthouse because their testimony was not needed." J.A. 100-01. Lee cross-referenced the due process argument that he had made in the direct appeal portion of the brief, J.A. 100, and asserted that he had been denied his rights to due process of law and the effective assistance of counsel. J.A. 96, 101.

In response to Lee's direct appeal, the state contended, for

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[6] In 1996, Missouri revised Rule 29.15 to eliminate the consolidated appeal procedure. *See* Mo. Sup. Ct. R. 29.15(g) (2001).

the first time, that Lee had failed to meet the requirements of Missouri Supreme Court Rule 24.10 regarding the proffer to be made when a continuance is requested because of the absence of witnesses. J.A. 107, 110, 112-13. The state also opposed the due process claim on the merits. J.A. 113-15. In response to Lee's postconviction appeal, the State maintained that Lee could not show that his trial counsel was responsible for the disappearance of the witnesses. The state answered the due process component of the claim by arguing that Lee was making an "impermissible attempt to raise the same claim he raised on direct appeal" and that the allegation that a state official told Lee's witnesses they could leave was "a self-serving conclusion unsupported by any evidence." J.A. 119-20.

On October 22, 1996, in a per curiam order and supplemental unpublished memorandum opinion, the Missouri Court of Appeals affirmed the convictions and the order denying the Rule 29.15 motion. J.A. 122-31. First, the appellate court rejected Lee's direct appeal challenging the trial court's denial of a continuance. The court cited Missouri Supreme Court Rule 24.09—a rule neither the state nor the trial court had mentioned—which requires that an application for a continuance be made in writing and accompanied by an affidavit, unless the adverse party consents to an oral motion. The appellate court explained:

> After a careful review of the transcript and legal file, we find that appellant's motion was oral, although we find no indication of the State's consent to this deviation, as is required by Rule 24.09. Thus, the trial court could have properly denied the motion for a failure to comply with Rule 24.09.

J.A. 126-27. The court continued: "Even assuming, *arguendo*, that the oral motion was sufficient, appellant's argument still fails. Whether the motion is written or oral, Rule 24.10 sets out the required elements for a continuance to be granted on the basis of an absent witness." J.A. 127. After quoting Rule 24.10, the court explained:

> [W]e find appellant's motion was made without the factual showing required by Rule 24.10. When a denial to grant a motion for continuance is based on a deficient application, it does not constitute an abuse of discretion. As appellant has the burden of establishing that the trial court abused its discretion in denying his motion for continuance, we find that the trial court did not abuse its discretion here.

J.A. 127-28 (citations omitted). Even if Lee had established that the denial of a continuance was an abuse of discretion, the Missouri Court of Appeals concluded, "he cannot show prejudice thereby, which is necessary to prevail on this point. In order to show prejudice, appellant has the burden of showing that the testimony of the absent witnesses was so crucial that it is reasonably probable a different outcome would have resulted." J.A. 128.

The Missouri Court of Appeals likewise affirmed the denial of postconviction relief and the motion court's refusal to conduct an evidentiary hearing regarding the disappearance of Lee's witnesses. The appellate court pointed out that Lee did not allege that ineffective assistance of counsel led to the witnesses' departure. The appellate court did not address the due process implications of Lee's claim that a state official told his witnesses that they could go. J.A. 131.

Lee filed in the Missouri Court of Appeals a request for rehearing or, in the alternative, a transfer of the case to the Missouri Supreme Court. He also applied directly to the Missouri Supreme Court for a transfer. These applications were denied.

4. <u>Federal Habeas Corpus Proceedings</u>

a. The District Court

On January 16, 1998, Lee filed a pro se petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Western District of Missouri. J.A. 132-62. Lee claimed that he was denied his rights to due

process and a fair trial when the trial court denied his motion for a continuance. J.A. 135, 136, 157; *see also* J.A. 144-45, 147-52 (elaborating on denial of continuance claim). Under the heading of "prosecutorial misconduct," Lee maintained that the prosecutor had instructed a court officer to inform his alibi witnesses that their testimony would not be needed until the following day. J.A. 137, 155-56. Lee also complained that the state courts improperly denied him an evidentiary hearing. J.A. 135.

In addition to his own affidavit averring that he was in California visiting his family at the time of Shelby's murder, J.A. 161-62, Lee submitted affidavits to the district court from his three alibi witnesses. J.A. 168-74. Gladys Edwards, James Edwards, and Laura Lee stated, in these affidavits, that Lee had been released from prison in 1992 and had promised to come visit the family in California by his birthday, which was in July, around the same time as the birthdays of two other family members. The family usually held a reunion to celebrate the various birthdays. Remon Lee kept his promise to visit in July 1992. His family picked him up from the airport; Lee stayed at his sister Laura Lee's home; and his stepfather drove him back to the airport in October 1992. The family claims that he did not leave until then because they begged him to stay through Halloween. J.A. 168, 171, 173. Each of these witnesses stated that they had traveled from California to Missouri to testify on Lee's behalf at trial and that an officer of the court informed them that their testimony would not be needed until the following day and that they were excused. J.A. 169, 171-72, 173-74. As Minister James Edwards put it: "We did not travel from California to abandon the boy, we came to testify." J.A. 174.

Lee also submitted the affidavit of Reginald Rhodes, who swore under oath that he had been willing to testify at Lee's trial and at any evidentiary hearing that: "[Lee] was not present, nor involved in the shooting death of Mr. Steve Shelby. I was told by the prosecutors office that they wanted Remon Lee, and did not care if he was involved or not." Rhodes

claimed that he was told by his attorney that "Remon Lee had witnesses to prove his where-abouts on the day and time in question. However, Remon Lee wound up getting maliciously prosecuted for a crime that he was not involved in." J.A. 166-67.[7]

The state responded that all of Lee's claims were procedurally defaulted and otherwise without merit. J.A. 182-89; *see also* J.A. 209-10. Lee argued in reply that if his claims were procedurally defaulted, then the state's interference with his witnesses' testimony was an "external factor" constituting "cause" to excuse the default and that he was prejudiced by the denial of his right to present a defense. J.A. 191, 198-200. Lee maintained that his affidavits and exhibits established his "actual innocence" of the crime, which would overcome any procedural bar. J.A. 191, 197, 200. He requested an evidentiary hearing. J.A. 201.[8]

On April 19, 1999, the district court denied the petition in its entirety and, without conducting an evidentiary hearing, dismissed the case with prejudice. J.A. 212-18. The court determined that Lee's due process claim based on the denial of the continuance was not "fairly presented" to the state courts because the motion was not made in writing and was not

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[7] Throughout the state and federal postconviction proceedings, Lee has complained about Rhodes's failure to testify on Lee's behalf at trial, attributing it either to ineffective assistance of counsel or trial error. While these claims are not before this Court, Rhodes's affidavit is relevant to Lee's contention that he is actually innocent of Shelby's murder, as discussed below in Part IV.

[8] In addition to the affidavits he had previously submitted, Lee also pointed to several police reports of witness interviews, which he appended, suggesting that Terry Barrett had been involved in Shelby's shooting because he suspected Shelby of breaking into his house and "ripping him off." J.A. 197-98, 202-08. One of these witnesses, the victim's mother, reported to the police that she had received a call from an unknown person stating that Rhodes was the shooter and Barrett the driver of the truck. J.A. 202. As Lynne Bryant testified at trial, Barrett was known to own and drive a red and white older model pickup truck. Tr. 486-87.

supported by the factual showing required by Rule 24.10. J.A. 217. The district court also held that Lee had failed to develop in state court the factual basis for his claim that an officer of the court caused his alibi witnesses to leave; accordingly, because Lee was unable to make the showing required under 28 U.S.C. § 2254(e)(2)(A) & (B), the district court determined that it could not consider his affidavits. J.A. 215. The court also concluded that Lee could not establish either "cause" for his procedural defaults or that he was actually innocent of the crime. J.A. 216, 217.

Lee filed a motion for relief from judgment or for reconsideration or rehearing, J.A. 220-26, which the district court denied. The court also denied Lee leave to proceed in forma pauperis on appeal and a certificate of appealability. J.A. 229-31.

b. The Court of Appeals

The Eighth Circuit appointed counsel and granted Lee a certificate of appealability on the question "whether appellant's due process rights were violated by the state trial court's failure to allow him a continuance." J.A. 232.

In a per curiam opinion issued on May 25, 2000, the court affirmed the denial of relief, over a dissent. J.A. 233-35. The court held that Lee had procedurally defaulted his due process claim by failing to comply with Missouri Supreme Court Rules 24.09 and 24.10. J.A. 234. The court did not address the district court's ruling that Lee was not entitled to an evidentiary hearing regarding the reasons his alibi witnesses had left. Moreover, the court rejected Lee's claim of ineffective assistance of counsel as "cause" for the default, but did not consider whether the witnesses' unexpected departure in the middle of trial or the state's alleged interference with the witnesses also could constitute "cause" for Lee's failure to comply with the Missouri rules governing continuances. J.A. 234-35.

In addition, the Eighth Circuit rejected Lee's claim of actual innocence as an exception to the required showing of

"cause and prejudice." Relying on circuit law, the court stated that Lee could not make the requisite showing "because the factual basis for the affidavits he relies on as new evidence existed at the time of the trial and could have been presented earlier." J.A. 235 (citation omitted). Even assuming that the alibi testimony was new evidence, the court continued, "Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi." *Id.*

Chief Judge Mark W. Bennett for the Northern District of Iowa, sitting by designation, wrote a vigorous dissent. He agreed that if Lee's due process claim was procedurally defaulted, then he could not demonstrate "cause and prejudice" or "actual innocence." J.A. 238-39 (Bennett, J., dissenting). But Judge Bennett "strenuously disagree[d] that [Rules 24.09 and 24.10] present any 'adequate' state law ground to bar federal *habeas* review of Lee's due process claim." J.A. 240. Although the dissent acknowledged that Missouri appellate courts have routinely held that a failure to comply with Rules 24.09 and 24.10 is sufficient to sustain a trial court's denial of a continuance, even when the requests were prompted by the absence of a witness, J.A. 242-44, he observed that "in *not one* of these cases was the absence of the witness sudden or unexpected." J.A. 244. Furthermore, he emphasized, the reliance in all of these state court decisions on "the defendant's prior knowledge of the unavailability of the witness, or circumstances that should have suggested to counsel that the witness would be unavailable at trial," implied that "a truly unexpected absence of a witness," as occurred here, "might excuse failure to comply or relax compliance with the written motion requirements of Rule 24.09 and the content requirements of Rule 24.10." J.A. 246.

Even if the procedural rules were correctly applied, Judge Bennett continued, the rules still would not suffice to bar Lee's federal habeas claims because those rules "should not be applied as a procedural default if the defendant could not be deemed to

have been apprised of their applicability." J.A. 246-47 (citation omitted). It is "simply unrealistic" as a practical matter, the dissent reasoned, to expect that "when confronted during trial with the sudden and unexplained absence of witnesses who have previously been in attendance, both voluntarily and under subpoena, counsel will be able to produce a written motion, supported by an affidavit, as required by Rule 24.09, detailing expressly the information required by Rule 24.10." J.A. 247. Thus, the dissent would have held that the applicability of these rules in Lee's circumstances was "not only not 'firmly established' or 'regularly followed,' it was not 'readily ascertainable.'" *Id.* Judge Bennett would have found that the rules posed no procedural bar for the additional reason that their application would "thwar[t] the assertion of federal rights" in the circumstances of this case. *Id.* (citation omitted).

The dissent highlighted the fact that Lee's affidavits "raise a serious factual issue, which no court has addressed, as to whether state action was responsible for the disappearance of the witnesses from the courthouse in the middle of the day on which their testimony was required." J.A. 251. Finally, as to the underlying merits of Lee's claim, Judge Bennett concluded that "it is hard to conceive of a more arbitrary action of a trial judge that could inflict greater prejudice to a defendant in a criminal case than the actions of the trial judge in Lee's case." J.A. 255; *see also* J.A. 254. The dissent would have remanded the case for an evidentiary hearing on Lee's due process claim. J.A. 255-56.

SUMMARY OF ARGUMENT

For seven years of state and federal postconviction proceedings, Remon Lee has protested that he is innocent of the murder for which he now serves a life sentence without possibility of parole. The jury that convicted him did so on the basis of two eyewitnesses whose credibility was undermined at trial and in the absence of any physical evidence or motive tying Lee to the crime. As he made clear to the jury, Lee intended to present an alibi defense through three family members who

traveled from California to testify that Lee was visiting them at the time of the murder. Lee never had an opportunity to present that alibi evidence, which was so pivotal to his defense, because the trial court denied him a brief continuance to locate his witnesses after they unexpectedly vanished from the courthouse after appearing that morning. Indeed, to date, no court has evaluated the evidence Lee would have presented.

1.a. The right of a defendant to "an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948); *see also Washington v. Texas*, 388 U.S. 14, 19 (1967). The denial of that opportunity in this case was extraordinary. In a first-degree murder prosecution, the trial judge denied a motion for a brief continuance to find witnesses critical to the defense—witnesses who had traveled from California, were under subpoena, and had appeared that morning in the courthouse—because the judge wanted to spend time on a personal matter. It is difficult to imagine a more arbitrary decision. In a case built entirely on eyewitness identifications, the testimony of Lee's alibi witnesses "was all but indispensable to any chance of [Lee's defense] succeeding." *Crane v. Kentucky*, 476 U.S. 683, 691 (1986). In stripping Lee of the chance to present his defense, the trial court denied Lee any semblance of a fair trial or a reliable verdict.

b. Although the reason for his witnesses' disappearance makes no difference to Lee's entitlement to relief, so long as that reason is not traceable to Lee or his counsel, the witnesses maintain that they left because they were told by an "officer of the court" that they were free to leave because they would not be called to testify that day. Such state interference with Lee's right to mount a defense, if established, would afford an additional basis for finding that Lee was denied a fair trial. *See, e.g., Webb v. Texas*, 409 U.S. 95 (1972) (per curiam); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Lee was entitled to an evidentiary hearing in federal court to prove this allegation. He exercised the requisite due diligence, *see (Michael) Williams v. Taylor*, 529 U.S. 420 (2000), in attempting to develop the

factual basis for the claim in state court, but the state courts refused to hold an evidentiary hearing. Hence any lack of factual development is the fault of the state, and 28 U.S.C. § 2254(e)(2) poses no bar to an evidentiary hearing.

2. The court of appeals held that it could not address the merits of Lee's due process claim because the Missouri Court of Appeals determined that the claim was procedurally defaulted as a result of Lee's alleged failure to comply with Missouri Supreme Court Rule 24.09, which requires that a motion for a continuance be in writing and accompanied by an affidavit, and Rule 24.10, which dictates the contents of the proffer to be made when the motion is based on the absence of a witness. Neither rule furnishes an adequate state law ground to defeat consideration of Lee's due process claim.

A state procedural ground is not "adequate" unless the rule is firmly established, regularly followed, and readily ascertainable by the defendant. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). The Missouri courts' application of Rules 24.09 and 24.10 falls woefully wide of that mark. The state courts routinely acknowledge and then forgive violations of both rules, addressing on the merits denials of defective motions for continuances. More fundamentally, even if a failure to comply with these rules would suffice to bar further review in the typical case, Rules 24.09 and 24.10 are not adequate as applied to Lee's unusual situation, where an oral motion for continuance was necessitated by the sudden and unexpected disappearance of Lee's witnesses. Nor is it even apparent which part of the showing required by Rule 24.10 Lee did not satisfy. The trial judge did not deny the requested continuance because there was doubt about what Lee's witnesses would say, but rather, because he had another engagement the next day. To demand that Lee instantaneously generate a written motion and affidavit moments after discovering the disappearance of his witnesses in the midst of trial would be "to force resort to an arid ritual of meaningless form." *Staub v. Baxley*, 355 U.S. 313, 320 (1958).

3. Even if Lee's due process claim is procedurally

defaulted, Lee has demonstrated "cause" and "prejudice" to excuse the default. If there was a procedural default, the sudden disappearance of Lee's alibi witnesses was surely "cause" for the lack of compliance with these rules (if indeed, there was noncompliance). The witnesses' abrupt departure constituted something "external" to the defense that placed counsel in a position in which he could not fully comply with the procedural rules governing continuances. That Lee maintains that a state officer induced the witnesses to leave only strengthens his contention that neither he nor his counsel was at fault for the witnesses' sudden disappearance and that, therefore, any procedural default must be excused. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986).

The record leaves no doubt that Lee has shown "actual prejudice" as a result of the denial of the continuance. The heart of Lee's defense was his alibi, and the state hardly had an overwhelming case against him. The testimony by Lee's mother, stepfather, and sister would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

4. Finally, Lee has demonstrated that the continued refusal to review his constitutional claim would result in a fundamental miscarriage of justice, the final safeguard to insure that an innocent man does not suffer an unconstitutional deprivation of liberty. In support of this "gateway" claim of actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995), Lee submitted affidavits from his three alibi witnesses and from Rhodes, the shooter, who swore that Lee was not involved in the murder. If these various statements are true, then no reasonable juror would have voted to convict Lee.

The court of appeals held, however, that Lee could not rely on his affidavits to establish his innocence because their factual basis "existed at the time of the trial and could have been presented earlier." J.A. 235. This new "due diligence" threshold cannot be reconciled with the fact that *Schlup* directed habeas courts to make their determinations concerning a prisoner's innocence in light of *all* the evidence in the case. The

Eighth Circuit's standard strips the miscarriage of justice exception of any power to protect a prisoner who can show that no reasonable juror would have convicted him in light of the new evidence, but who cannot show "cause and prejudice" to excuse a procedural default. If this Court finds that Lee defaulted his due process claim and cannot show cause and prejudice, it should remand for an evidentiary hearing to permit the district court to determine whether, in light of the new evidence, no reasonable juror would have voted to convict.

ARGUMENT

Petitioner recognizes that this Court must first consider whether Lee has procedurally defaulted his due process claim before it may consider the merits of that claim. In order to explain why there is no procedural default here, however, we must first present the merits of Lee's claim and the context in which that claim arose.

I. THE TRIAL COURT'S DENIAL OF A BRIEF CONTINUANCE TO ALLOW LEE TO PRESENT HIS ALIBI WITNESSES VIOLATED LEE'S RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW, AND HE IS ENTITLED TO AN EVIDENTIARY HEARING TO ESTABLISH WHY THE WITNESSES LEFT.

A. The Trial Court's Denial of the Requested Overnight Continuance Violated Lee's Right to Present a Defense.

More than fifty years ago, this Court recognized that "[a] person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948). The fundamental right of a defendant to be heard, to have "his day in court," is worth little if the defendant has no meaningful ability to call witnesses to testify on his behalf. As this Court has emphasized time and again:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). Indeed, "[t]he right of an accused in a criminal trial to due process is, in essence," this Court has explained, "the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). In short, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted).

The trial court's refusal, for purely personal reasons, to grant Lee a brief continuance to present what amounted to his "entire defense," *id.* at 691, is a textbook violation of due process. It is undisputed that Lee's alibi witnesses were under subpoena and had been present in the courthouse on the very day their testimony was needed. As witnesses under subpoena in a criminal case, they were subject to "attachment" under Missouri law. *See* Mo. Sup. Ct. R. 26.03. No evidence has ever been produced that the witnesses' sudden disappearance after traveling more than 1,000 miles to testify on Lee's behalf was somehow attributable to the defendant or his counsel, and indeed, Lee and his counsel were baffled by their unexplained departure from the courthouse. J.A. 17-18. Lee suggested that even a "couple hours' continuance" to try to locate his family members, who he knew were still in town, might suffice, emphasizing that "it's very valuable to my case." J.A. 18.

That was an understatement. Lee's alibi was his entire defense. To be sure, defense counsel had undermined the credibility of Williams and Sanders on cross-examination and

had introduced additional impeachment evidence during the defense case. But, without doubt, Lee's best chance of persuading the jury that the eyewitnesses had identified the wrong man was the testimony of his mother, stepfather, and sister that he was in California at the time the crime was committed, evidence that was not and could not be presented through any other witness. Their testimony "was all but indispensable to any chance of [Lee's defense] succeeding." *Crane*, 476 U.S. at 691. Its absence meant that Lee was forced to defend against eyewitness testimony—essentially to prove a negative—with both hands tied behind his back.

And if the jury had harbored any doubt of Lee's guilt, that doubt was surely removed by Lee's failure to produce the alibi witnesses he had promised and by the prosecutor's exploitation of the witnesses' absence in her closing argument. J.A. 27 ("Where are those alibi witnesses that Mr. McMullin promised you from opening[?] They're not here. No doubt Remon Lee was in town here on August 26th and August 27th."). The circumstances could only have suggested to the jury that Lee's promised alibi defense was a lie, making his guilt of Shelby's murder appear that much more likely.

Faced with the certainty that Lee would be unable to present his alibi defense unless granted a short continuance, the trial court denied a continuance not for any reason related to the merits of the request but because he had planned to stay with his daughter in the hospital on Friday, the following day. J.A. 20, 22. Lee's counsel proposed a continuance until Monday, but again, the court cited the calendar: another trial was scheduled. J.A. 22. His counsel asked for "capiases" (arrest warrants) to bring the witnesses in and informed the court of where he believed the witnesses were staying, but again, to no avail. J.A. 18, 20.[9] Commenting without any factual basis that the

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[9] The trial court's rush to wrap up the case was also evident at several other points during the trial. *See, e.g.*, Tr. 277 (asking, on the second day of trial: "[A]re we getting to this case tried by tomorrow noon? At the present rate we aren't going to make it."); Tr. 440 (stating before recessing

witnesses—who had traveled voluntarily from California at their own expense, were under subpoena, and were present in the courthouse on that same day—apparently had "abandoned" the defendant, J.A. 22, the trial court denied the requested continuance without considering less draconian alternatives and ordered the trial to resume. In so doing, the trial court virtually assured that Lee would spend the rest of his life in prison without ever having had the chance to present his defense that he was not in Missouri when the crime was committed.

This Court has recognized that when a continuance is necessary to present an effective defense, a denial of a continuance may violate due process. "The matter of continuance is traditionally within the discretion of the trial judge and it is not every denial of a request for more time that violates due process . . . . Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citation omitted); *accord Morris v. Slappy*, 461 U.S. 1, 11-12 (1983). The *Ungar* Court acknowledged that there are no "mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process," but that "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." 376 U.S. at 589.

That answer is not difficult to come by here. Lee's request for a brief delay was as compelling and as reasonable a request as can be imagined, and the reasons the trial court gave for its denial, utterly capricious. The guaranteed rights to present a defense and to compulsory process are meaningless if they do

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on the second day of trial: "I hope we can get through with this case very quickly in the morning so the jury can go to work."); Tr. 565 (stating, just before the taped interview of Williams was played: "You may play it. Play it fast, would you please."); Tr. 570 (stating just before the lunch break on the last day: "[T]his courtroom is going to be used for a hearing at 2:00, so let's move things along faster.").

not also entail a right to a reasonable recess to secure the attendance of witnesses essential to the defense who have been duly subpoenaed. As the Eighth Circuit dissent observed, "it is hard to conceive of a more arbitrary action of a trial judge that could inflict greater prejudice to a defendant in a criminal case than the actions of the trial judge in Lee's case." J.A. 255 (Bennett, J., dissenting). The trial Lee received was fundamentally unfair and produced a verdict unworthy of confidence. The Great Writ was conceived to provide relief in precisely such circumstances, when the "basic justice of [a petitioner's] incarceration" is at issue. *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976).

On several occasions, this Court has found that the denial of a continuance deprived the defendant of a fair trial in circumstances no more compelling than these. In *Pate v. Robinson*, 383 U.S. 375, 385 & n.7 (1966), for example, the trial court had not held a hearing on the defendant's competence to stand trial and had denied the defendant a few hours' continuance during trial to obtain the testimony of a psychiatrist; this Court granted habeas corpus relief on due process grounds. In *Chandler v. Fretag*, 348 U.S. 3 (1954), the Court granted relief where the defendant had been denied a continuance to obtain counsel regarding the surprise accusation that he was a "habitual criminal," when he had been prepared to plead guilty only to the indicted offense. On review of the denial of state habeas corpus relief, this Court held that the denial of a continuance violated due process because it effectively denied him the right to counsel. *Id.* at 9-10; *accord Reynolds v. Cochran*, 365 U.S. 525, 530 (1961) (applying *Chandler* to similar facts). Similarly here, Lee and his counsel were surprised to learn at trial that his main defense witnesses had vanished. The trial court denied Lee's request for a continuance to locate the witnesses and arrest them if necessary, thereby effectively stripping Lee of his right to present witnesses

vital to his defense.[10]

B. This Court Should Remand for an Evidentiary Hearing to Determine Whether a State Official Told Lee's Witnesses That They Could Leave.

Lee was denied due process for an additional reason: his alibi witnesses maintain that the reason they left the courthouse is because they were told by an "officer of the court" that they were free to leave because they would not be called to testify that day. J.A. 169, 172, 174. The Due Process Clause forbids state officials from interfering with the presentation of a criminal defense. *See, e.g., Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (per curiam) (holding that trial court deprived petitioner of due process of law when it threatened and harassed a defense witness). Nor may the prosecution interfere with the defendant's right to marshal and present evidence in his defense. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963); *cf. Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (per curiam) (granting federal habeas relief where the exclusion from the record on appeal of transcript of counsel's closing arguments at sentencing was attributable to "the State's own erroneous assertions that closing arguments had not been transcribed"). If a court officer or a prosecutor told the witnesses that they were free to leave, that interference with Lee's defense violated his right to due process.

Lee was entitled to an evidentiary hearing to prove that

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[10] The federal courts of appeals generally agree that it is a violation of due process to deny a continuance in cases like this one, where the witnesses were crucial to the defense, the reason for the denial was arbitrary, the defendant had not created the need for the continuance, and/or the requested continuance was brief. *See, e.g., United States v. Mejia*, 69 F.3d 309, 314-19 (9th Cir. 1995); *Manlove v. Tansy*, 981 F.2d 473, 476-79 (10th Cir. 1992); *Bennett v. Scroggy*, 793 F.2d 772, 774-77 (6th Cir. 1986); *Dickerson v. Alabama*, 667 F.2d 1364, 1369-71 (11th Cir. 1982); *Hicks v. Wainwright*, 633 F.2d 1146, 1147-50 (5th Cir. 1981); *Singleton v. Lefkowitz*, 583 F.2d 618, 623-24 (2d Cir. 1978); *see also Johnson v. Johnson*, 375 F. Supp. 872, 873-76 (W.D. Mich. 1974).

charge. The district court refused to consider the witnesses' affidavits or to hold a hearing because, despite his access to his family members and the reason for their departure, Lee did not develop the factual basis of this claim in state court and could not meet the burden of 28 U.S.C. § 2254(e)(2). J.A. 215. The court of appeals did not address the issue on appeal.[11]

The district court's conclusion, which predated this Court's decision in *(Michael) Williams v. Taylor*, 529 U.S. 420 (2000), in which this Court construed section 2254(e)(2), rests on an incorrect interpretation both of the requirements of section 2254(e)(2) and of the Missouri postconviction statute under which Lee was proceeding in state court. Lee presented this claim in compliance with Missouri postconviction procedure, and thus the fault for any lack of factual development lies with the state, not Lee.

As this Court explained in *Williams*, "[b]y the terms of its opening clause [§ 2254(e)(2)] applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings.' If the prisoner has failed to develop the facts, an evidentiary hearing cannot be granted unless the prisoner's case meets the other conditions of § 2254(e)(2)." 529 U.S. at 430. "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. "Diligence," the Court explained, "will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

Lee demonstrated the requisite diligence in state court. He alleged in his amended state postconviction motion under Rule

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[11] Note that whether Lee failed to comply with Missouri Supreme Court Rules 24.09 and 24.10, as discussed below in Part II, is relevant only to the question of whether he procedurally defaulted his due process claim based on the denial of the continuance, as described in Part I.A., and not to his contention that he is entitled to an evidentiary hearing regarding why his witnesses left.

29.15 that he was denied due process when his alibi witnesses were "told by an unknown person that they could leave the courthouse because they were not needed to testify." J.A. 56; *see also* J.A. 57-59. Lee made a timely request for an evidentiary hearing, J.A. 54, 62, which was denied by the postconviction court, J.A. 75, and then affirmed on appeal. J.A. 131.

Lee's allegations were sufficient under state law to require an evidentiary hearing. Lee did not submit affidavits to the state postconviction court, but Rule 29.15 did not require that he do so. Rule 29.15(d), which specifies the required contents of the motion, requires only that the defendant verify his motion, as Lee did here. J.A. 52, 64. A defendant need only *plead*—not prove—facts in a Rule 29.15 motion which, if true, entitle him to an evidentiary hearing. *Missouri v. Driver*, 912 S.W.2d 52, 56 (Mo. 1995). To receive an evidentiary hearing under Rule 29.15, the movant must meet three requirements: (1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not conclusively refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant. *Driver*, 912 S.W.2d at 55 (remanding for an evidentiary hearing where defendant's motion pleaded facts supporting his claim of ineffective assistance of counsel which, if true, warranted relief and were not conclusively refuted by the record); *Missouri v. Watson*, 806 S.W.2d 677, 680 (Mo. Ct. App. 1991) (remanding for an evidentiary hearing); *see also* Rule 29.15(g); *Missouri v. Yates*, 869 S.W.2d 270, 272-73 (Mo. Ct. App. 1994); *Jones v. Missouri*, 771 S.W.2d 349, 351 (Mo. Ct. App. 1989).

Lee was entitled to an evidentiary hearing under this standard. His amended Rule 29.15 motion set forth several pages of factual allegations identifying his alibi witnesses, describing their proposed testimony, and explaining that a state official had told them they could leave. J.A. 56-59. If proved, his allegations would warrant relief. The facts alleged by Lee were not refuted by the record in the case; indeed, the record was silent as to why the witnesses left. And finally, the state's

alleged interference with the availability of witnesses central to Lee's defense prejudiced Lee and denied him a fair trial. Thus, Lee made a motion sufficient to merit an evidentiary hearing under Missouri law. Because Lee did not "fail" to develop the factual basis of his claim in state court, section 2254(e)(2) poses no bar to an evidentiary hearing. *See Williams*, 529 U.S. at 435 ("[O]nly a prisoner who has neglected his rights in state court need satisfy" the conditions set out in § 2254(e)(2)(A) & (B)).

The only remaining issue, then, is whether Lee is entitled to an evidentiary hearing under the standards of *Townsend v. Sain*, 372 U.S. 293 (1963). Because Lee has "allege[d] facts which, if proved, would entitle him to relief" and did not receive "a full and fair evidentiary hearing in a state court," the district court was required to conduct an evidentiary hearing on this issue. *Id.* at 312; *see also Blackledge v. Allison*, 431 U.S. 63, 76 (1977) (remanding for further proceedings where petitioner's allegations were not so "palpably incredible" or so "patently frivolous or false" as to warrant summary dismissal).

II. LEE'S DUE PROCESS CLAIM IS NOT PROCEDURALLY DEFAULTED BECAUSE THE DECISION OF THE MISSOURI COURT OF APPEALS DID NOT REST ON "ADEQUATE" STATE LAW GROUNDS.

The Eighth Circuit did not reach the merits of Lee's claim that the denial of a continuance violated his right to due process because it concluded that the claim was procedurally defaulted as a result of Lee's alleged failure to comply with Missouri Supreme Court Rules 24.09 and 24.10. J.A. 234. This conclusion was in error. As Judge Bennett explained at length in his dissent, J.A. 239-56, the decision of the Missouri Court of Appeals did not rest on any adequate state law ground.

This Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997) (quoting *Coleman v. Thompson*, 501 U.S.

722, 729 (1991)). Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny, an adequate and independent finding of procedural default will bar federal habeas review of a federal claim unless the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," *Harris v. Reed*, 489 U.S. 255, 262 (1989) (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986)), or can demonstrate that a failure to consider the federal claim will result in a "fundamental miscarriage of justice." *Id.* (quoting *Carrier*, 477 U.S. at 495) (citation and internal quotation marks omitted). This heightened standard, this Court has emphasized, is predicated on the need to deter "intentional defaults" or "sandbagging" by the defense, and on "a judgment that the costs of federal habeas review 'are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts.'" *Carrier*, 477 U.S. at 487 (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)); *accord Sykes*, 433 U.S. at 89-90.

As discussed below, the "independent and adequate state ground" doctrine has no application here because neither Rule 24.09, which requires that a motion for a continuance be made in writing and accompanied by an affidavit, nor Rule 24.10, which sets forth the showing required when the motion is predicated on the absence of a witness (*e.g.*, materiality, due diligence, and good faith), can defeat review of Lee's due process claim where defense counsel did all he could possibly be expected to do, given the exigencies, to present Lee's request for a continuance to the trial court.

A. Missouri Supreme Court Rules 24.09 and 24.10 Are Not Consistently Followed.

This Court has "consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (citation omitted).

A state procedural ground is not "adequate" unless the rule is "firmly established," "regularly followed," and readily

ascertainable by the defendant. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); *see also Coleman*, 501 U.S. at 758 (White, J., concurring). The Missouri appellate courts' application of Rules 24.09 and 24.10 to motions for continuances falls far short of this standard. On occasions too numerous to catalog fully here, the Missouri courts have overlooked deficiencies in compliance with both rules and reached the merits of the denials of these deficient motions for continuances (albeit only to affirm the denials on other grounds). For example, the Missouri courts routinely forgive violations of Rule 24.09 and address denials of oral motions for continuances on the merits. In *Missouri v. Peters*, 731 S.W.2d 480, 482 (Mo. Ct. App. 1987), for instance, the Missouri Court of Appeals noted that the motion for continuance was not in writing or accompanied by an affidavit, but then reached the merits, holding that it was "not necessary for us to strictly enforce Rule 24.09 because we find no abuse of discretion in denying defendant's oral motion for continuance." To the same effect was *Missouri v. Ruth*, 830 S.W.2d 24, 25, 27 & n.4 (Mo. Ct. App. 1992), where the court discussed the merits of a denial of an oral request for a continuance, while expressly stating: "We do not reach the state's argument that the defendant's request for a continuance did not comply with applicable supreme court rules."[12]

Even more commonly, the Missouri appellate courts mention that a given request for a continuance was made orally, but then address the merits of the appeal from the denial of the

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[12] Other instances where the Missouri appellate courts acknowledged a defendant's failure to comply with Rule 24.09 and nevertheless reached the merits of the denial of the continuance include: *Missouri v. Johnson*, 812 S.W.2d 940, 943 (Mo. Ct. App. 1991); *Missouri v. Stout*, 675 S.W.2d 931, 935 (Mo. Ct. App. 1984); *Missouri v. Wade*, 666 S.W.2d 869, 870-71 (Mo. Ct. App. 1984); *Missouri v. Smith*, 633 S.W.2d 412, 416-17 (Mo. Ct. App. 1982); *Missouri v. Jordan*, 639 S.W.2d 400, 401 (Mo. Ct. App. 1982); *Missouri v. Winston*, 627 S.W.2d 915, 918 (Mo. Ct. App. 1982).

request—either without acknowledging the noncompliance with Rule 24.09 at all, *see, e.g., Missouri v. Schaal*, 806 S.W.2d 659, 666-67 (Mo. 1991) (reaching merits of oral motion for continuance that was based on counsel's need for more time to prepare); *Missouri v. Greathouse*, 694 S.W.2d 903, 907-08 (Mo. Ct. App. 1985) (addressing merits of denial of oral request for a continuance to obtain an alibi witness),[13] or citing the rule only in passing or as an afterthought. *See, e.g., Missouri v. Merrick*, 677 S.W.2d 339, 342 & n.2 (Mo. Ct. App. 1984) (finding no abuse of discretion in denial of defendant's oral request for continuance and then noting that the motion failed to comply with Rule 24.09); *see also Missouri v. Downen*, 3 S.W.3d 434, 438 (Mo. Ct. App. 1999); *Missouri v. Kechrid*, 822 S.W.2d 552, 555 (Mo. Ct. App. 1992).

So, too, have the Missouri appellate courts been willing to overlook deficiencies in defendants' compliance with Rule 24.10 as to the showing required when the motion is predicated on the absence of a witness. In *Missouri v. Richardson*, 718 S.W.2d 170 (Mo. Ct. App. 1986), for example, the defendant had made a motion for a continuance on the grounds that his counsel was inadequately prepared and that he wanted to obtain the presence of alibi witnesses. The Missouri Court of Appeals observed that the defendant had failed to provide details concerning the witnesses, as required by Rule 24.10, but then explained that it would "review this issue ex gratia," and passed on the merits of the request. *Id.* at 172.

In still other instances, the Missouri courts have remarked on defects in the showing made for the requested continuance—*e.g.*, the defendant failed to demonstrate the materiality of the absent witness's testimony or due diligence in attempting to obtain the witness's presence—but then upheld

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[13] *See also Missouri v. Bell*, 719 S.W.2d 763, 767 (Mo. 1986); *Missouri v. Haggard*, 619 S.W.2d 44, 46-47 (Mo. 1981), *vacated on other grounds*, 459 U.S. 1192 (1983); *Missouri v. Petterson*, 780 S.W.2d 675, 679 (Mo. Ct. App. 1989); *Missouri v. Adkins*, 678 S.W.2d 855, 858 (Mo. Ct. App. 1984); *Missouri v. Stout*, 604 S.W.2d 710, 715-16 (Mo. Ct. App. 1980).

the denial of the continuances on the merits without citing Rule 24.10 as a procedural bar. *See, e.g., Missouri v. Davis*, 625 S.W.2d 903, 905 (Mo. Ct. App. 1981) (upholding denial of continuance on the merits where no information was given the court as to what the absent witness's testimony would be); *Missouri v. Ashley*, 616 S.W.2d 556, 558 (Mo. Ct. App. 1981) (affirming denial of continuance on the merits while noting that the record did not indicate that the absent witness could have been found if more time had been allowed).

Such decisions call into question whether Rule 24.10 can even be deemed a procedural state rule that is separate from the merits. In contrast to Rule 24.09, which sets forth a distinct procedural requirement that a motion for continuance be made in writing, Rule 24.10 describes the actual substantive showing required to obtain a continuance when the motion is based on the absence of a witness. This showing merges with the merits of the request, as is evidenced by any number of Missouri decisions finding no abuse of discretion by the trial court in denying a request for a continuance where elements required by Rule 24.10 (such as materiality or the likelihood that the witness can be procured within a reasonable time) were missing. *See, e.g., Missouri v. Lachterman*, 812 S.W.2d 759, 762-63 (Mo. Ct. App. 1991) (affirming denial of continuance where trial court could reasonably conclude that the missing witness would not be found).[14] Indeed, whether a particular denial of a continuance is so arbitrary as to violate due process *depends* on "the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). In other words, in affirming denials of continuances where an inadequate showing was made regarding absent witnesses, the Missouri appellate courts are in actuality reaching the merits of these appeals, rather than enforcing a procedural bar.

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[14] *See also Fuller v. Missouri*, 837 S.W.2d 304, 306-07 (Mo. Ct. App. 1992); *Missouri v. McLaurin*, 684 S.W.2d 570, 570 (Mo. Ct. App. 1984); *Missouri v. Green*, 647 S.W.2d 902, 903-04 (Mo. Ct. App. 1983).

For all of these reasons, it cannot be said that the Missouri courts apply Rules 24.09 and 24.10 "evenhandedly to all similar claims," *Hathorn*, 457 U.S. at 263, or have "so consistently applied" these rules "as to amount to a self-denial of the *power* to entertain the federal claim here presented." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 234 (1969).

B. Rules 24.09 and 24.10 Are Not Adequate to Defeat Review of Lee's Due Process Claim in These Particular Circumstances.

More importantly, however, even if a failure to comply with Rules 24.09 and 24.10 is sufficient to preclude further review in the typical case, the rules are not adequate as applied here. *See Michel v. Louisiana*, 350 U.S. 91, 95 (1955) ("[I]n the circumstances of a particular case, the application of [a procedural rule] may not give a reasonable opportunity to raise the federal question."). There is no disputing the fact that the Missouri appellate courts have affirmed denials of oral motions for continuances made during or near the time of trial that were prompted by the absence of a witness because the motions did not comply with Rules 24.09 or 24.10. But, as Judge Bennett observed below, in not one of these cases was the absence of the witness sudden or unexpected, J.A. 244; nor did any of these cases involve circumstances even remotely as compelling as these. *See, e.g., Missouri v. Wolfe*, 13 S.W.3d 248, 261 (Mo. 2000) (upholding denial of oral motion for continuance made during trial where "no one had seen [the missing witness] in weeks"); *Missouri v. McCarter*, 820 S.W.2d 587, 589 (Mo. Ct. App. 1991) (affirming denial of oral motion for continuance on morning of trial when absence of witness was a "matter well known before trial" and defendant conceded that witness "may not ever be located or produced").[15]

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[15] *See also Missouri v. Dodd*, 10 S.W.3d 546, 555 (Mo. Ct. App. 1999) (defendant "conceded in his motion that he had not been able to locate the confidential informants for several months before his trial"); *Fuller*, 837 S.W.2d at 306 (witness "had been missing for more than a year, despite extensive efforts to locate her by both sides"); *Lachterman*, 812 S.W.2d at 762-63 (trial court had already granted three continuances to find the missing witness, including a search by a private investigator); *Missouri v. Anderson*, 785 S.W.2d 299, 302 (Mo. Ct. App. 1990) (improbable that personal presence of the missing witness could be obtained and no showing of a request for a subpoena to compel her attendance); *Missouri v. Tettamble*, 746 S.W.2d 433, 439-40 (Mo. Ct. App. 1988) (defendant never verified where the absent witness could be found or that the writ to compel his attendance had been served before trial).

In fact, as the dissent concluded, the reliance in all of these decisions on the defendant's prior knowledge of the unavailability of the witness suggests that "a truly unexpected absence of a witness, as occurred in this case, might excuse failure to comply or relax compliance" with the requirements of Rules 24.09 and 24.10. J.A. 246; *see, e.g., McCarter*, 820 S.W.2d at 589 (stating that the failure to comply with Rule 24.09 was sufficient grounds to affirm the denial of the continuance and that "[t]his is particularly true where the factual basis for the motion was not a last minute or unexpected surprise"); *Missouri v. Adams*, 808 S.W.2d 925, 930 (Mo. Ct. App. 1991) (commenting that had the absent witnesses "been subpoenaed in timely fashion, had their absence resulted from illness, accident or some other unexpected cause," appellant's argument in support of his oral motion for continuance would have been stronger).

Indeed, the trial court's refusal to grant even a short delay or issue a writ of body attachment, and the absence of any other assistance by the trial court or the state in finding Lee's witnesses, contrasts sharply with several other Missouri cases in which defendants had made procedurally defective motions for continuances which were denied only after other options had been explored. *See, e.g., Wolfe*, 13 S.W.3d at 261 (state had also attempted to find missing witness); *Missouri v. Sneed*, 874 S.W.2d 489, 491 (Mo. Ct. App. 1994) (trial court granted a several hour recess and issued a "body attachment" for an absent defense witness); *Missouri v. Coats*, 835 S.W.2d 430, 433-34 (Mo. Ct. App. 1992) (trial court granted continuance

early on Friday afternoon and over weekend for the sole purpose of allowing an absent defense witness, who had not been subpoenaed, to testify); *Missouri v. Gasaway*, 720 S.W.2d 3, 5 (Mo. Ct. App. 1986) (trial court issued writ of body attachment for subpoenaed witness and defendant acknowledged that "the Sheriff made a diligent effort to locate [the witness] but was unable to do so"). As the Missouri Court of Appeals remarked in *Adams*:

> It might have been possible to proceed with the trial and present all of the available witnesses for each side, then recess overnight to see whether the Johnstons could be produced the following day. However, appellant's lawyer did not request that, nor did he offer any clue as to when the Johnstons might be found.

808 S.W.2d at 929-30. Here, by contrast, Lee requested exactly that—an overnight recess to produce his witnesses who, unlike the missing witnesses in *Adams*, had been subpoenaed, had appeared in court, and were known to be staying in town at a relative's home. For these reasons, even if Rules 24.09 and 24.10 could be viewed "in retrospect to form part of a consistent pattern of procedures," the rules would remain insufficient to bar review of Lee's due process claim because he could not be "deemed to have been apprised of" their applicability in these unusual circumstances. *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)).

More importantly, there was no way for Lee to comply with the requirement of Rule 24.09 that his motion for a continuance be in writing at the moment he discovered his witnesses had suddenly left, J.A. 247, 251 (Bennett, J., dissenting). Lee did, however, raise the denial of the continuance in his written motion for a new trial, *see* J.A. 31-32, and at every stage of the state court proceedings thereafter. Not surprisingly, neither the trial court nor the prosecutor cited that procedural deficiency during the colloquy

on the motion. The prosecutor did not even object to the requested continuance. Nor did the state argue on direct appeal that the denial of the continuance should be affirmed because of a failure to comply with Rule 24.09, underscoring still further the lack of any legitimate state interest in applying that procedural rule under these circumstances.

As for Rule 24.10, it is not even apparent, as the dissent observed, which part of the rule was not satisfied, either by Lee's limited-purpose testimony on the stand, counsel's representations at the time he moved for a continuance, or by counsel's detailed discussion of the alibi testimony in his opening statement the day before. J.A. 249-51 (Bennett, J., dissenting); *see Ward v. Board of County Comm'rs*, 253 U.S. 17, 22-23 (1920) (a non-federal ground for decision is inadequate if it is "without any fair or substantial support"). First, Rule 24.10(a) requires that the application for a continuance show facts regarding the "materiality of the evidence sought to be obtained" and "due diligence" on the part of the applicant to obtain such witness or testimony. Here the materiality of the alibi testimony was obvious and unquestioned. Lee's counsel had explained at length in his opening statement that the witnesses would testify that Lee was in California, not Kansas City, at the time of the murder, J.A. 12-13, and had reminded the trial court of the identity of the witnesses during the exchange regarding the continuance. J.A. 16. Lee's due diligence in attempting to obtain the presence of the witnesses was equally evident, as the witnesses had previously appeared and were under subpoena. *See Missouri v. Johnson*, 618 S.W.2d 191, 194-95 (Mo. 1981) (per curiam) (state's previous issuance of subpoena to absent witness showed that it had exercised due diligence to obtain the witness's presence).

Second, Rule 24.10(b) requires the name and residence of such witness, if known, and "facts showing reasonable grounds for belief" that the attendance or testimony of such witness "will be procured within a reasonable time." Lee's counsel provided the name of each of the witnesses and the local address where they were staying. J.A. 16, 17, 20. Lee established "reasonable

grounds for belief" that the attendance of the witnesses would be "procured within a reasonable time" when he testified that he knew that the witnesses were still in town because his stepfather had a religious event to attend that night and the next. J.A. 18.

Third, Rule 24.10(c) requires a showing of the "particular facts" the applicant believes the witness will prove and that he knows of no other person whose evidence or attendance he could have procured at trial who could prove or so fully prove the same facts. In this case, counsel had outlined in his opening statement only the day before the "particular facts" the alibi witnesses would prove, and it was evident that no other testimony could establish Lee's alibi defense.

Finally, Rule 24.10(d) requires that the applicant show that the witness is not absent by the "connivance, consent, or procurement of the applicant." The undisputed testimony and representations of Lee and his counsel that the witnesses had been present at the courthouse before the lunch recess, that they had no idea why the witnesses had not returned, and that Lee's girlfriend was searching for them, J.A. 16-18, were more than sufficient to satisfy the requirements that the witness not be absent for reasons attributable to the defendant and that the request not be made "for vexation or delay, but in good faith." Rule 24.10(d). Lee's showing prompted the dissent below to remark: "it is impossible to imagine that counsel could have done more to meet the requirements of Missouri Supreme Court Rules 24.09 and 24.10." J.A. 249. What the Court held in *James v. Kentucky* has equal force here: "Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more evident than it is here." 466 U.S. at 351.

Whether the Missouri Court of Appeals correctly interpreted them or not, Rules 24.09 and 24.10 cannot defeat Lee's due process claim because they serve no conceivable state interest in this instance—both because technical compliance would have been impossible and because the prosecutor and the trial court received all of the information the rules require. As the Missouri Court of Appeals has explained, "[t]he reason for

[these] rules is obvious. It is to permit the court to pass upon the merits of a request for a continuance." *Missouri v. Fletcher*, 758 S.W.2d 476, 478 (Mo. Ct. App. 1988). Lee's request for a continuance fulfilled that state interest. The trial judge denied the request on the merits. He did so not because he was in the dark about what Lee's witnesses were expected to prove, but rather, because he had another engagement the next day. Rules 24.09 and 24.10 cannot, consistent with due process, be applied to bar consideration of a meritorious constitutional claim where the exigencies prevented literal obedience, any more than a rule requiring that a motion for continuance be filed ten days in advance could be applied to bar review of a constitutional claim stemming from the sudden need for a continuance.

As this Court has recognized, a state procedural ground is "adequate" only where "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Wainwright v. Sykes*, 433 U.S. 72, 83 n.8 (1977) (citation omitted); *accord Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978). To require Lee to generate instantly a written motion and affidavit moments after discovering the disappearance of his witnesses in the midst of trial would exalt form over substance, "forc[ing] resort to an arid ritual of meaningless form." *Staub v. Baxley*, 355 U.S. 313, 320 (1958). A long line of precedents from this Court confirm that when a defendant has brought the substance of his claim to the state court's attention, the state's formalistic interest in its rules is inadequate to bar review of the defendant's federal claim. *See Trevino v. Texas*, 503 U.S. 562, 566-67 (1992) (per curiam) (applying *Ford v. Georgia* to find that petitioner effectively "presented his equal protection claim to the trial court" even though his "assertion of his rights" may have been "inartful[]"); *James*, 466 U.S. at 349 (holding that to insist on a particular label for defendant's requested admonition to the jury "would further no perceivable state interest"); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam) (granting relief where the Alabama Supreme Court refused to entertain review because the petition was not filed on

the right kind of paper).[16]

"The consideration of asserted constitutional rights may not be thwarted," this Court has recognized, "by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (finding no adequate state law ground barring federal review where the Alabama courts had not previously applied their rules "with the pointless severity shown here"). The oft-quoted assertion by Justice Holmes of the primacy of plainly asserted federal rights is especially apt here: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *see also* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1142 (1986) ("[T]he most important category of inadequate state grounds includes those rules that, even if fairly and consistently applied, heavily burden the assertion of federal rights without

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[16] *See also Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (concluding that the Court could reach petitioner's due process claim because his attorney had pressed the issue of the state's failure of proof on lewdness before the trial court and "nothing would be gained by requiring [him] to object a second time, specifically to the jury instructions"); *Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965) ("[A]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here."); *Henry v. Mississippi*, 379 U.S. 443, 448 (1965) (suggesting that Mississippi's interest in its contemporaneous objection rule may have been "substantially served" by petitioner's motion for directed verdict); *Brown v. Western Ry.*, 338 U.S. 294, 295-96 (1949) (rejecting application of local rule that barred review of claim because of the lack of a precise allegation that the "particular clinker" on which petitioner stumbled was there because of respondent's negligence); *Rogers v. Alabama*, 192 U.S. 226, 229-31 (1904) (rejecting the adequacy of a state law ground barring review of motion to quash the indictment because of its "prolixity").

significantly advancing any important state policy.").

Lee's request for a continuance contrasts strikingly with the defendants' failures to comply with the state procedural rules in *Wainwright v. Sykes* and its progeny, many of which involve a failure to make a contemporaneous objection or to meet a deadline. There was no like failing here on the part of the defense. The rationale for extending the "independent and adequate state law ground" doctrine to federal habeas corpus cases is simply inapposite where the petitioner has given the state courts every opportunity, at every stage of the proceedings, to rectify the fundamental error that occurred when the trial court denied Lee a brief continuance. *Compare Murray v. Carrier*, 477 U.S. 478, 487 (1986) (procedural defaults at trial deprive the state courts of the opportunity to correct errors). It was the trial court's refusal to grant a few hours' continuance to permit Lee to locate his witnesses and to present his defense, and the subsequent refusal of the state appellate courts to correct the error, that "detract[ed] from the perception of the trial . . . as a decisive and portentous event." *Sykes*, 433 U.S. at 90. It was this unwillingness, rather than a failure on the part of Lee to bring the issue to the trial court's attention, that made these federal habeas proceedings necessary. This Court's procedural default jurisprudence imposes on criminal defendants only "a burden of reasonable compliance" with state procedural rules. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). Far from having intentionally, or even inadvertently, defaulted his federal constitutional claim, Lee, as he said in his pro se Petition for Certiorari, at 12, "did everything a [p]etitioner could do in state court to present his federal violation for the courts' review."

III. LEE HAS SHOWN "CAUSE" AND "PREJUDICE" TO EXCUSE ANY PROCEDURAL DEFAULT.

Even assuming that Lee's due process claim is procedurally barred, he has demonstrated "cause and prejudiee" to excuse the default.

A. Cause. In this case, the question of whether Lee can

show "cause" to excuse any procedural default is simply the flipside of the question whether his due process claim was defaulted at all. Examination of his alleged noncompliance with Rules 24.09 and 24.10 from this perspective leads to the same result: Lee is entitled to review on the merits of his due process claim.

If there was a procedural default because the motion for a continuance was not in writing or because Lee failed to make a formal proffer of the elements required by Rule 24.10, the sudden disappearance of Lee's alibi witnesses was surely "cause" for the lack of compliance with these rules (if indeed, there was noncompliance). Although it has resisted giving the term "cause" any fixed content, *Smith v. Murray*, 477 U.S. 527, 533-34 (1986); *Reed v. Ross*, 468 U.S. 1, 13 (1984), this Court has explained that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Carrier*, 477 U.S. at 488. The witnesses' abrupt departure mid-trial certainly was "something *external* to the petitioner, something that cannot fairly be attributed to him," *Coleman v. Thompson*, 501 U.S. 722, 753 (1991), that would have impeded counsel's ability to comply with the state's rules.

That Lee contends that a state officer induced the witnesses to leave, as discussed in Part I.B., only bolsters the argument that neither Lee nor his counsel was at fault for the witnesses' abrupt departure and that therefore, any procedural default should be excused. If a state officer told the witnesses they could leave, then Lee has made a classic showing of "cause" for any failure to make the request for a continuance in proper form. *See Carrier*, 477 U.S. at 488 ("some interference by officials" that "made compliance impracticable" would constitute cause); *see also Strickler v. Greene*, 527 U.S. 263, 283 (1999) (finding "cause" where "conduct attributable to the State" impeded trial counsel's access to the factual basis for his claim); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (finding "cause" where petitioner's failure to raise a jury challenge in the

trial court was attributable to the concealment of evidence by the state).

The writ of habeas corpus "has traditionally been regarded as governed by equitable principles." *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion) (citation omitted). These equitable principles have led this Court's procedural default jurisprudence to "concentrate on petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey*, 499 U.S. at 490. If, for whatever reason—as long as that reason is not traceable to Lee or his counsel—the alibi witnesses abruptly left the courthouse before they were to testify, placing counsel in a position where he could not fully comply with the procedural rules governing motions for continuances, then Lee has a "legitimate excuse" for any deficiency with his motion.

Neither the court of appeals nor the district court addressed this argument. Because his allegations, if proved, would establish cause for any default, Lee is entitled, at the very least, to an evidentiary hearing to determine why his witnesses left. *See id.* at 494 ("The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard."); *Amadeo*, 486 U.S. at 219 (noting that the lower court had remanded for an evidentiary hearing on cause).

B. Prejudice. The record in this case leaves no doubt that Lee has also shown "actual prejudice as a result of the alleged violation of federal law." *Coleman*, 501 U.S. at 750. Although this Court has also "refrained from giving 'precise content' to the term 'prejudice,'" *United States v. Frady*, 456 U.S. 152, 168 (1982) (citation omitted), it has demanded a showing that the constitutional error "worked to [the petitioner's] *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id.* at 170. In other words, Lee must show that he was denied "fundamental fairness" at trial. *Carrier*, 477 U.S. at 494.

Finding no cause to excuse the alleged procedural default,

the court of appeals majority did not reach the issue of prejudice. J.A. 235; *cf.* J.A. 254-55 (Bennett, J., dissenting). The prejudice from the trial court's denial of a continuance to permit Lee an opportunity to present his alibi witnesses, however, is manifest. As discussed in Part I, the heart of Lee's defense was his alibi. And the state hardly had an overwhelming case against him, based, as it was, on the testimony of two eyewitnesses—one of whom identified him for the first time at trial, a year and a half after the shooting took place—and both of whom saw the driver of the truck only for a matter of seconds and then only from the shoulders up. *Cf. Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (noting "such important details" as the fact that two eyewitnesses had their best views of the gunman only as he fled the scene with his body partly concealed in a car). The descriptions the two eyewitnesses gave of the driver did not even match, as Sanders testified that the driver was wearing sunglasses, while Williams said that the driver was not wearing glasses. Tr. 276, 404. There was no physical evidence tying Lee to the scene of the crime or any evidence of motive. The victim's sister and neighbor, neither of whom was disinterested, testified that they saw Lee with Rhodes the night before the shooting, but they allegedly saw him at night under viewing conditions that were less than ideal, and neither of them spoke to the man they claimed was Lee.

That Lee was convicted and now serves a life sentence on the basis of eyewitness testimony alone, without any opportunity to present his defense that he was elsewhere at the time of the crime, is deeply troubling. "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).[17] The testimony by

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[17] *See* U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* xiv, 15, 24 (1996) (reporting that in virtually all 28 cases in which, as of early 1996, convicted defendants had been exonerated by DNA evidence, the triers of fact had relied on eyewitness identifications which turned out to be wrong), *available at* http://www.ojp.usdoj.gov/nij/for96.htm. In one case, five witnesses testified that they had seen the defendant with the nine-year-old victim on the day of the murder. *Id.* at 15; *see also* Helen O'Neill, *The Perfect Witness*, Wash. Post, Mar. 4. 2001, at F1 (describing the exoneration of a man sentenced to life imprisonment for rape based almost exclusively on the victim's eyewitness testimony).

Lee's mother, stepfather, and sister, who traveled from California to attest to the fact that Lee had been visiting them when Shelby was shot, certainly could have made a difference. Their testimony would have "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Adding to the demonstrable prejudice from Lee's inability to put on his alibi defense is the fact that the jury had been promised an alibi defense by Lee's counsel in his opening statement and during voir dire and then reminded of his failure to fulfill that promise by the prosecutor in her closing argument. J.A. 10-13, 27. The circumstances should compel a determination that the defendant did not receive "a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler*, 527 U.S. at 290 (citation omitted). Lee has made the requisite showing of prejudice.

IV. LEE IS ENTITLED TO A HEARING TO EVALUATE WHETHER HE IS ACTUALLY INNOCENT OF THE CRIME.

The very nature of the writ of habeas corpus demands "that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). To that end, this Court has continually reaffirmed that principles of comity and finality "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982); *accord Schlup*, 513 U.S. at 320-21; *Smith v. Murray*, 477 U.S. 527, 537 (1986); *Carrier*, 477 U.S. at 495.

Thus, a petitioner may secure review of a defaulted federal constitutional claim, even in the absence of "cause and prejudice" to excuse the default, if "he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" *Schlup*, 513 U.S. at 314-15 (quoting *McCleskey*, 499 U.S. at 494). The miscarriage of justice exception to "cause" serves as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty." *McCleskey*, 499 U.S. at 495 (quoting *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976)). The exception is met if the petitioner can show "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327 (remanding for further consideration of Schlup's claim of actual innocence).

For more than seven years of state and federal proceedings, Lee has protested his innocence of Shelby's murder. In support of his "actual innocence" claim, which he asserts under *Schlup* as a "gateway" to his underlying due process claim, Lee submitted to the district court the affidavits of his three alibi witnesses, all of whom state that Lee was in California in August 1992 when Shelby was killed. J.A. 168-74. Curiously, the state did not call Rhodes, the shooter, who had already pleaded guilty, to testify against Lee at trial. Lee, however, submitted to the district court an affidavit from Rhodes, contending that Lee "was not present, nor involved in the shooting death of Mr. Steve Shelby." J.A. 166. As was the case in *Schlup*, in which new statements cast doubt on whether the petitioner had been involved in the murder in that case, Lee's "new statements may, of course be unreliable. But if they are true . . . it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Schlup*, 513 U.S. at 331.

A. The court of appeals held, however, that Lee had failed to prove his actual innocence because the factual basis for the affidavits upon which he relies "existed at the time of the trial and could have been presented earlier." J.A. 235 (citing

Meadows v. Delo, 99 F.3d 280, 282 (8th Cir. 1996)); *see also Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (en banc) (holding that evidence is "new" within the meaning of *Schlup* only if it was "not available at trial and could not have been discovered earlier through the exercise of due diligence"), *cert. denied*, 523 U.S. 1123 (1998). This new due diligence standard, derived from earlier Eighth Circuit cases dealing either with freestanding claims of innocence based on newly discovered innocence or abuses of the writ, *e.g.*, *Meadows*, 99 F.3d at 282; *Smith v. Armontrout*, 888 F.2d 530, 541 (8th Cir. 1989), is not only perverse as applied here, where Lee has strived diligently to present his alibi evidence both at trial and at every state and federal proceeding ever since, but is flatly inconsistent with *Schlup* and other decisions of this Court.

As Judge Jean Hamilton, the same district court judge who decided *Schlup*, explained in a thoughtful opinion, reliance on abuse-of-the-writ case-law "to define 'new evidence' in a *Schlup* claim is inappropriate because the actual innocence exception does permit a habeas court to review the merits of a constitutional claim, notwithstanding that the claim is abusive, successive, or otherwise procedurally barred." *Reasonover v. Washington*, 60 F. Supp. 2d 937, 947 (E.D. Mo. 1999). In *Schlup*, this Court deliberately eschewed any such due diligence requirement:

> To be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—*that was not presented at trial*.

513 U.S. at 324 (emphasis added). As the *Schlup* Court elaborated, the "actual innocence" standard allows the reviewing court "to consider the probative force of relevant evidence that was *either excluded or unavailable at trial*." *Id.* at 327-28 (emphasis added). Thus, the habeas court must make its determination concerning petitioner's innocence "in light of

all the evidence, including that alleged to have been illegally admitted . . . and evidence tenably claimed to have been *wrongly excluded* or to have become available only after the trial." *Id.* at 328 (emphasis added) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970)); *accord Bousley v. United States*, 523 U.S. 614, 623 (1998); *see also Kuhlmann v. Wilson*, 477 U.S. 436, 454 n.17 (1986).

The court below rewrote *Schlup* to allow federal habeas courts to consider only evidence that was not available at trial. Such a limitation simply interposes another layer of procedural default analysis, requiring prisoners, in essence, to show "cause" before their new evidence of innocence may be heard. The imposition of this new hurdle to actual innocence claims cannot be squared with the fact that the *Schlup* standard was designed as a final backstop for innocent prisoners who could not show "cause and prejudice" for their procedural defaults. *See Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring) ("The operative test is cause and prejudice; there is a kind of 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause."). The Eighth Circuit's standard strips the miscarriage of justice exception of any power to protect a petitioner who can actually show that no reasonable juror would have convicted him "in the light of the new evidence." *Schlup*, 513 U.S. at 327. In almost all procedural default cases, prisoners in the Eighth Circuit with compelling evidence of their innocence will be unable to present that evidence to a federal habeas court. *See Reasonover*, 60 F. Supp. 2d at 949 & n.8 (explaining how the Eighth Circuit's standard would effectively nullify claims of actual innocence, particularly in ineffective assistance of counsel cases). Yet this Court plainly intended the "actual innocence" exception to capture cases like this one, when procedural default doctrine does not adequately account for a state prisoner who may very well be innocent.

Not only is the court of appeals' due diligence requirement inconsistent with the legal standard established in *Schlup*, but it

is inconsistent with the outcome in *Schlup* as well. In remanding the case for further proceedings on Schlup's actual innocence claim, the Court relied upon new evidence that was readily available to trial counsel, including statements from two witnesses, one who had actually testified at trial, and another who had been available to testify if he had been contacted. *Schlup*, 513 U.S. at 310 n.21, 312 n.25. A "due diligence" standard would have barred consideration of that evidence. *Cf. Sawyer v. Whitley*, 505 U.S. 333, 347-48 (1992) (considering whether petitioner's medical records constituted evidence of "actual innocence of the death penalty" without imposing a "due diligence" threshold requirement).

Thus, a claim of actual innocence may be based on "reliable evidence not presented at trial," *Calderon v. Thompson*, 523 U.S. 538, 559 (1998)—whatever the reason it was not presented. *See also id.* at 573 (Souter, J., dissenting) (actual innocence standard is met with "a demonstration of innocence by evidence 'not presented at trial,' even if it had been discovered, let alone discoverable but unknown, that far back") (citation omitted). The question, in other words, is not whether the evidence is new to the defendant, but whether it is new to the jury.

B. The court of appeals held, in the alternative, that "[e]ven assuming the alibi testimony was new evidence, Lee did not show with the required likelihood that reasonable jurors would not have convicted based on the word of three family members when the testimony of four prosecution witnesses refuted the alibi." J.A. 235. But if the statements of Gladys Edwards, James Edwards, Laura Lee, and Reginald Rhodes are true, then no jury would have voted to convict. *See Schlup*, 513 U.S. at 331. These are not new witnesses that have come forward only at the eleventh hour. Lee has been attempting to present his alibi defense in every available forum since his trial, and he complained about his lawyer's failure to call Rhodes as a defense witness as early as his sentencing hearing. J.A. 35-39.

The evidence that the jury never heard in this case "call[s] into question the credibility of the witnesses presented at trial,"

thereby requiring the district court "to make some credibility assessments." *Schlup*, 513 U.S. at 330. The court of appeals could not conduct the "probabilistic inquiry" as to whether "in light of the new evidence, no juror, acting reasonably," would have voted to convict, *id.* at 329-30, without first requiring the district court to conduct an evidentiary hearing to evaluate the credibility of these witnesses. The court of appeals was not entitled to preempt that evaluation by holding as a matter of law that reasonable jurors necessarily would have accepted the less than airtight testimony of the state's witnesses over that of Lee's family members and his co-defendant. Even if both sets of witnesses appear equally believable, then Lee has met the *Schlup* standard, for no reasonable juror, confronted with seemingly credible eyewitness testimony that the defendant committed a crime and equally credible testimony from alibi witnesses that the defendant was out of state when the crime was committed, would have found the defendant guilty beyond a reasonable doubt.

Accordingly, if this Court finds that Lee's due process claim is procedurally defaulted, it should remand for an evidentiary hearing to determine whether Lee made the requisite showing of "actual innocence" to warrant consideration of his due process claim.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court reverse the decision of the court of appeals.

Respectfully submitted,

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MAY 2001

APPENDIX

APPENDIX A

28 U.S.C. § 2254(e)(2) provides as follows:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

APPENDIX B

The pertinent Missouri Supreme Court Rules in effect in 1994 are as follows:

RULE 24.09 MISDEMEANORS OR FELONIES—APPLICATION FOR CONTINUANCE—HOW MADE

An application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally.

(Adopted June 13, 1979, effective Jan. 1, 1980)

RULE 24.10 MISDEMEANORS OR FELONIES—APPLICATION FOR A CONTINUANCE ON ACCOUNT OF ABSENCE OF WITNESSES SHALL SHOW WHAT

An application for a continuance on account of the absence of witnesses or their evidence shall show:

(a) The facts showing the materiality of the evidence sought to be obtained and due diligence upon the part of the applicant to obtain such witness or testimony;

(b) The name and residence of such witness, if known, or, if not known, the use of diligence to obtain the same, and also facts showing reasonable grounds for belief that the attendance or testimony of such witness will be procured within a reasonable time;

(c) What particular facts the affiant believes the witness will prove, and that he knows of no other person whose evidence or attendance he could have procured at the trial, by whom he can prove or so fully prove the same facts;

(d) That such witness is not absent by the connivance, consent, or procurement of the applicant, and such application is not made for vexation or delay, but in good faith for the purpose of obtaining a fair and impartial trial.

If the court shall be of the opinion that the affidavit is insufficient it shall permit it to be amended.

(Adopted June 13, 1979, effective Jan. 1, 1980)

RULE 29.15 CONVICTION AFTER TRIAL—CORRECTION

(a) Nature of Remedy—Rules of Civil Procedure Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violate the constitution and laws of this state or the constitution of the United States, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure before the trial court is governed by the Rules of Civil Procedure insofar as applicable.

(b) Form of Motion—Time to File—Cost Deposit Not Required—Notice of Filing, to Whom—Failure to File, Effect of. A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form 40. If an appeal of the judgment sought to be vacated, set aside or corrected was taken, the motion shall be filed within thirty days after the filing of the transcript in the appeal pursuant to Rule 30.04. If no appeal of such judgment was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections. No cost deposit shall be required. Movant shall give notice of the filing of the motion to any court in which the appeal of the judgment of conviction is pending. Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15.

(c) Clerk's Duties. Movant shall file his motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion the clerk shall notify the sentencing judge.

(d) Contents of Motion. The motion to vacate shall include every ground known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion.

(e) Pro Se Motion—Appointment of Counsel—Amended Motion, Required When—Withdrawal of Appointed Counsel. When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the grounds are asserted in the motion and whether the movant has included all grounds known to him as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all grounds known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and grounds. For good cause shown, appointed counsel may be permitted to withdraw. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed.

(f) Amended Motion—Form, Time for Filing—Response by Prosecutor. Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within ten days after the date an amended motion is required to be filed.

(g) Request for Hearing, Time for Filing—Hearing, Not Required, When—Time Hearing to Be Held. A request for a hearing shall be made by motion on or before the date an amended motion is required to be filed. Within fifteen days after the date an amended motion is required to be filed, the court shall determine whether to grant a hearing. If no request for hearing is timely filed or if the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. If a hearing is ordered, it shall be held within sixty days of the date of the order granting a hearing.

(h) Presence of Movant—Record of Hearing—Continuance of Hearing—Burden of Proof. At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving his grounds for relief by a preponderance of the evidence.

(i) Findings and Conclusions, Issued, When—Judgment. The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held, within thirty days of the submission of the case. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence him or order a new trial or correct the judgment and sentence as appropriate.

(j) Appeal—Standard of Appellate Review. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering same. If the sentencing court finds against the movant on the issue of indigency and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigency so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this Rule 29.15 shall be limited to a determination of whether the findings and conclusions of the trial court are clearly erroneous.

(k) Successive Motions. The circuit court shall not entertain successive motions.

(l) Effect of Motion on Pending Appeal—Consolidation of Appeals. If a motion is filed under this Rule 29.15 and an appeal is pending from the judgment of conviction that is the subject of the motion, the appeal shall be suspended until final determination of the issues raised by the motion. Appellant shall give notice to the court where the appeal is pending of the entry of judgment on the motion filed under this Rule 29.15 within ten days of the entry of the judgment. If an appeal is filed from the judgment sustaining or overruling a motion filed under the provisions of this Rule 29.15, the appeal from the judgment of conviction shall be consolidated with the appeal from the judgment on the motion. The record on appeal shall consist of the transcript and legal file from both the judgment of conviction and the judgment on the motion. If a claim of ineffective assistance of counsel was presented in the motion, the attorney representing movant on the motion filed pursuant to this Rule 29.15 shall be the attorney on appeal for the consolidated case.

(m) Schedule. This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1988. If sentence is pronounced prior to January 1, 1988, and no prior motion has been filed pursuant to Rule 27.26, a motion under this Rule 29.15 may be filed on or before June 30, 1988. Failure to file a motion on or before June 30, 1988, shall constitute a complete waiver of the right to proceed under this Rule 29.15. If a sentence is pronounced prior to January 1, 1988, and a prior motion under Rule 27.26 is pending, post-conviction relief shall continue to be governed by the provisions of Rule 27.26 in effect on the date the motion was filed.

(Added Feb. 11, 1987, effective Jan. 1, 1988. Amended May 23, 1987, effective Jan. 1, 1988.)

APPENDIX C

[Filed July 13, 1995]

IN THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

CV94-28462
Division 3

REMON LEE,
Movant,

v.

STATE OF MISSOURI,
Respondent.

RESPONSE IN OPPOSITION TO MOVANT'S *PRO SE* MOTION AND FIRST AMENDED MOTION TO VACATE, SET ASIDE OR CORRECT THE JUDGMENT OR SENTENCE PURSUANT TO RULE 29.15

COMES NOW the State of Missouri, by and through Linda Koch, Assistant Prosecuting Attorney, and offers the following suggestions and points of authority in response to movant's *pro se* motion and first amended motion for post-conviction relief:

1. On February 24th, 1994, a jury found Movant guilty of Count I Murder in the first degree, and Count II Armed Criminal Action, in Case Number CR93-0453. The April 19, 1994 sentencing imposed Count I, life without parole and Count II, 10 years concurrent, in case number CR93-0453.

2. On April 19, 1994, the Honorable Anthony P. Nugent, Senior Judge, sentanced Movant to concurrent terms of life

without parole on the count of murder and ten (10) years imprisonment on the count of armed criminal action.

3. Movant filed an appeal with the Missouri Court of Appeals, Western District, on November 21, 1994. Movant's record on appeal was stayed pending the result of the 29.15 proceeding.

4. Movant entered into custody at Potosi Correctional Center, Mineral Point Missouri on May 31, 1994.

5. Movant filed his *pro se* motion pursuant to Rule 29.15 on November 17, 1995.

6. The following are Movant's alleged grounds in support of his *pro se* and first amended Rule 29.15 motion for deprivation of effective assistance of counsel during trial, and the State's responses:

7. Movant was represented at trial by Mr James McMullin.

Movant alleges he was denied his constitutional rights due to the fact that he received "ineffective assistance of counsel". His allegations contained in his *pro se* motion and first amended motion are as follows:

I. Pro Se Motion

In Movant Pro Se Motion he claims that he received ineffective assistance of counsel because counsel did not submit an alibi instruction nor did counsel move to modify the instructions to include MAI-CR3d 308.04 (1987) or MAI-CR 3d 308.06 (1987).

II. First Amended Motion

Movant alleges in his First Amended Motion that his attorney was ineffective because:

1) he failed to present evidence in his defense and to due process of the law because his alibi witnesses left the courthouse without testifying;

2) that he was denied due process of law because an "unknown person in the prosecutor's office told Movant's alibi witnesses they could leave, and he was unfairly denied a continuance upon learning this;

3) that his attorney failed to adequately consult hims about his right ot testify on his own behalf;

4&5) that his trial counsel failed to object to State's instruction number six; that his trial counsel failed to investigate and/or ask for a continuance to investigate or to object to the testimony of Rhonda Shelby;

6) that his attorney was ineffective in that he did not submit an alibi instruction.

GENERAL LAW ON INEFFECTIVE ASSISTANCE OF COUNSEL

To maintain an ineffective assistance of counsel claim, the petitioner must satisfy a two pronged test. First, movant must show that the attorney's conduct did not conform to the care and skill of a reasonably competent lawyer rendering similar services under existing circumstances. If the Court finds that the attorney's conduct did not so conform, then the movant must further show that his conduct thereby prejudiced him. *Seales v. State*, 500 S.W.2d 733,737 (Mo. banc 1979); *Strickland v. Washington*, 466 U.S. 688, 104 5. Ct. 2052, 80 L. Ed. 2d. 6674 (1984); *Wilson v. State*, 626 S.W.2d 243 (Mo. banc 1982).

The burden upon Movant to show ineffective assistance of counsel is a heavy one. *Murphy v. State*, 636 S.W.2d 699,702 (Mo. App. 1982). Further, in connection with an allegation of ineffective assistance of counsel, counsel is presumptiveiy

competent. *Campbell v. State*, 660 S.W.2d 721, 722 (Mo. App. 1983).

MOVANT'S PRO SE MOTION

In Movant Pro Se Motion he claims that he received ineffective assistance of counsel because counsel did not submit an alibi instruction nor did counsel move to modify the instructions to include MAI-CR3d 308.04 (1987) or MAI-CR 3d 308.06 (1987).

This claim has absolutely no merit because there was no evidence of alibi adduced at trial. (See Trial Transcript, "Defendant's Evidence, pgs. 491-589).

MOVANT'S FIRST AMENDED MOTION

1. Movant's first allegation of ineffective assistance of counsel is that his attorney was ineffective because Movant's alibi witnesses left the courthouse without testifying. This is not a cognizable claim because there is no cause or effect relationship stated by Movant as to how his attorney was connected with his witnesses leaving.

2. Movant claims in his next allegation that someone from the State told his alibi witnesses that they could leave the third day of trial when they were waiting to testify. No one from the State had contact with these witnesses except Det. Garry Wantland who interviewed them about what they would testify to at trial. This happened in the evening of the first day of the trial. No one else from the State spoke to defense witnesses. Defense witnesses, who were defendant's mother, his stepfather and his sister, had been flown in from California the evening before trial by Mr. McMullen. (See Trial Transcript, pgs. 573-582) They knew who defendant's attorney was. Even if they would have left because someone from the prosecutor's office told them to, it does not make sense that they would have listened to someone from the

prosecutor's office, and not made an inquiry of defendant's attorney.

This is a bare conclusion and is not a factual allegation that can even be proven to be true; therefore, it is not a proper post conviction claim. *Kelly v. State*, 796 S.W.. 2d 658 (Mo. App. 1990).

3. Movant claims that counsel inadequately consulted with him about his right to testify on his own behalf at trial. This claim can be refuted by the record as Movant's attorney went over his right to testify or to not testify on the record with Movant. (Trial Transcript, pgs. 34-35, line 1-9, and pgs. 573-579).

4. Movant claims in his third allegation of ineffective assistance of counsel that his attorney did not object to the giving of Instruction No. 6 which does not require the jury to find that Movant deliberated. Instruction number 6 or MAI-CR3d 313.02 modified by 304.04 was the proper instruction in effect at the time of the trial, February 22nd, 1994. This instruction was later changed, but the effective date of the change was October 1st, 1994, eight months after the trial of this case. Since the Court is required to give the MAI-CR3d instructions, any objection Mr. McMullen would have made would have been meritless.

Allegations of instructional error are beyond the scope of a motion for post conviction relief and are matters for direct appeal. *State v. Shurn* 866 S.W. 2d (Mo. banc 1993). *Richardson v. State* 773 S.W.2d 858 (Mo. App. 1989). *Battle v. State* 745 S.W.2d 730 (Mo. App.1987). *Henderson v. State* 789 S.W.2d 498 (Mo. App. 1990).

In determining whether counsel gives ineffective assistance to his client on the law, the attorney's conduct is measured by what the law is considered at the time of trial. Counsel is not ineffective for not anticipating change in the law. *Hawkins v.*

State, 843 S.W.2d 606 (Mo. App. 1993). See also *State v. Cunningham*. 863 S.W.2d 914 (Mo. App. 1993).

5.& 6 Movant, in his fifth and sixth allegations in his first amended motion claims that trial counsel failed to ask for a continuance or conduct more investigation on a witness, Rhonda Shelby and failed to object and request a mistrial at the testimony of Rhonda Shelby.

Defense counsel had the police report which contained Rhonda Shelby's name and her interview with the police about what she knew about the case. Ms. Shelby's testimony amounted to the fact that she knows the defendant and had seen the defendant at her apartment complex the night before her brother's murder, and he had been looking for the victim. Mr. McMullin did an adequate job cross-examining this witness, and defendant has failed to State how Mr. McMullins' "lack of investigation" has prejudiced him. "Counsel has a duty to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. *Sanders v. State*. 738 S.W.2d 856, 858 (Mo. banc 1987)." *Evans v. State*, 759 S.W.2d 858 (Mo. App. 1988).

As Ms. Shelby was an endorsed witness, the objection to her testimony clearly would have been without merit, as would a motion for mistrial. It cannot be said that such a motion would have had a lot of merit, and counsel is not required to make an objection that is without merit. *State v. Settle*. 670 S.W.2d 7 (Mo. App. 1984). In fact, the mere fact that a meritorious objection is not made, whether by design or accident is not basis for ineffective assistance of counsel. There must be an overall showing that counsel's performance fell short of established norms and that the incompetence effected the result. *Jones v. State*. 784 S.W.2d 789 (Mo. banc 1990). Even if he had made his objection, it would not have affected the outcome of the trial. *State v. Bryant*, 658 S.W.2d

935 (Mo. App. 1983); *State v. Wynn*. 666 S.W.2d 663 (Mo. App. 1984). Therefore these points must be denied.

WHEREFORE, the State respectfully requests this Court to dismiss Movant's Rule 29. 15 Motion without a hearing, as all Movant's claims can be refuted from the record or by law.

Respectfully Submitted,

/s/ Linda Koch
LINDA KOCH (36849)
Assistant Prosecuting Attorney